ACHIEVING EQUITY

Recommendations for Dispute Intervention Practice in the Probate & Family Court

1995

Prepared By:
Committee for Gender Equality
Supreme Judicial Court

Issued By:
Gender Equality Advisory Board
The Trial Court of Massachusetts

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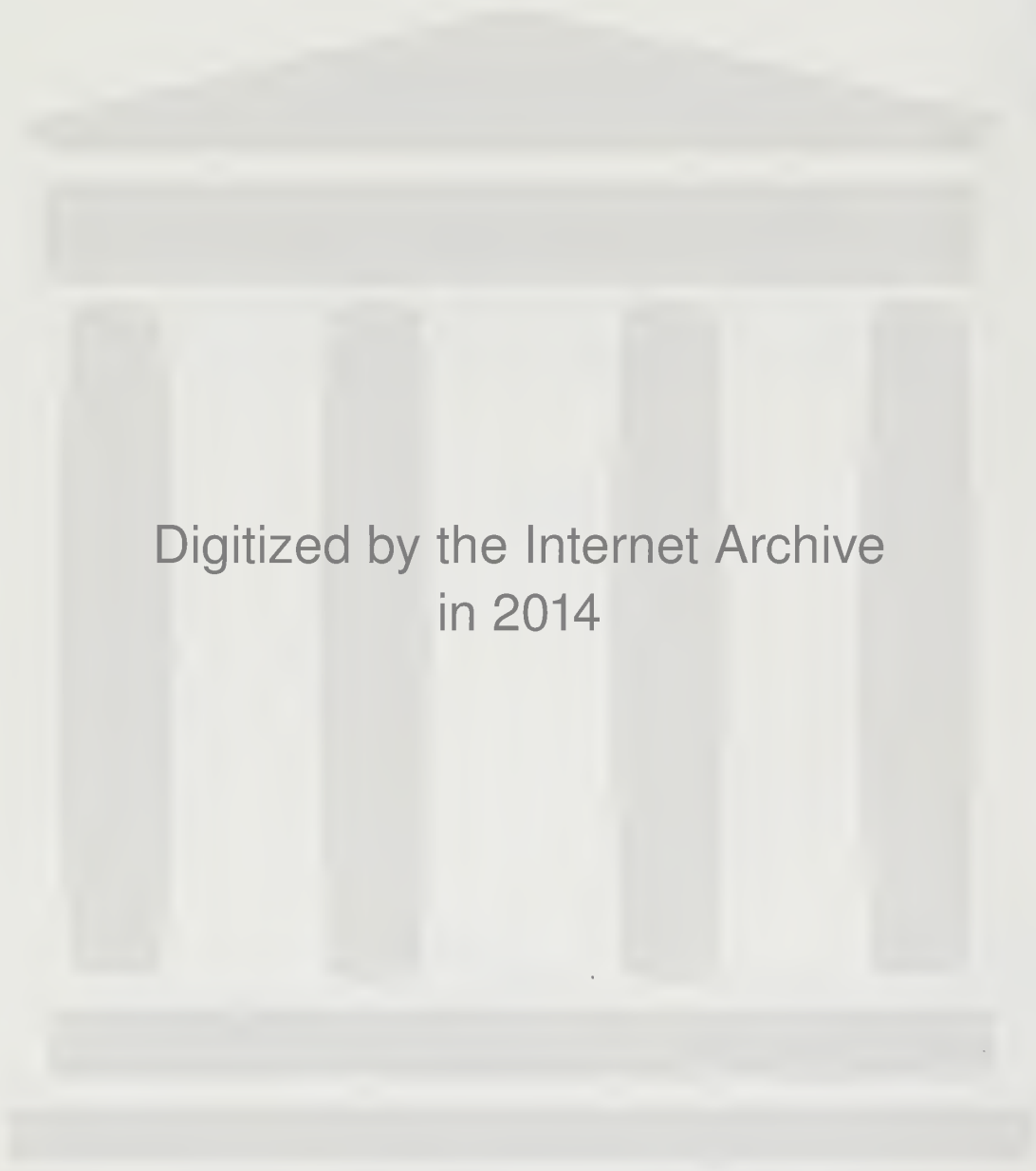

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INTRODUCTION

During the next decade, most litigants who file family-related cases in the Probate and Family Court will utilize the services of the family service office, particularly for those cases which involve children. Many of those who use or benefit from the services view the family service office as crucial to the court's functioning effectively. Though many used similar words, one Probate and Family Court judge interviewed by the Task Force summed up as follows: "If the court had to hear all *pro se* litigants or counsel on every issue, the court would be completely in a state of gridlock."[1]

Participants in the Massachusetts Gender Bias Study expressed concern about this form of alternative dispute resolution in family matters - women tend to be disadvantaged by the institutionalization of a power imbalance between the parties when cases are mediated by the family service office.[2] This report summarizes three years of research and discussion, and enlarges upon the original recommendations concerning mediation set forth in the 1989 Gender Bias Study.[3]

The first section of this report explains the history and authority for family service intervention, and provides the context for the recommendations contained in the second section.[4] This first section also describes the current practice in family service offices. The Probate and Family Court Department refers some cases for mediation outside the family service office, such as to the Middlesex Multi-Door Probate and Family Court Mediation Project. However, at present, the great majority of cases are handled by family service.

The second section contains recommendations for reforming intervention services. It suggests ways the services can be renamed, divided, labeled, and defined so that the purpose of each intervention is clear. It also proposes educating litigants so that they will know what to expect from family service intervention. Procedural mechanisms are proposed which are designed to ensure that dispute intervention is a fair and beneficial process for everyone who uses it and that it does not further disempower the most vulnerable litigants, who are usually women. The next section proposes considerations for reform in substantive areas of family law in which gender bias can be identified and addressed in family service practice. The report concludes with a look at long term goals, including suggestions for additional research and reform in areas less susceptible to immediate change. The report's appendices include a glossary, an explanation of methodology, proposed model practice tools and information about probation officers practicing in family service and about cases currently referred to family service.

The Task Force on the Role of Mediation in the Probate Court studied dispute intervention services available in the Probate and Family Court and surveyed those engaged in the practice in and outside the court system. The Task Force was comprised of judges, attorneys, probation officers (family service officers), litigants, mediators and others with experience in the Probate and Family Court and with mediation as practiced in the courts and in private settings. The Task Force utilized both a working group and a larger review group to encourage serious consideration of these issues. Some areas provoked intense debate. Task Force members offer recommendations only in those areas in which they were able to reach consensus through a process of discussion and compromise. Particularly in substantive legal areas, the Task Force suggests considerations and encourages further discussion.

The Task Force on the Role of Mediation in the Probate Court has no direct authority to implement recommendations and relies on those involved in developing this report, as well as others acting as individuals and members of groups, to build on these ideas. The family service office is an evolving adjunct to the litigation process and it deserves continued attention, evaluation and increased resources to continue improving the quality of service delivery and reduce the opportunity for gender bias.

EVOLVING USE OF PROBATION OFFICERS TO RESOLVE DISPUTES

I. HISTORY OF THE USE OF PROBATION OFFICERS IN PROBATE AND FAMILY COURT

In the 1960's, at the request of judges, the Probate and Family Court began to use personnel to gather information or otherwise prepare cases for hearing. This practice was formalized in the late 1960's by legislation authorizing the use of probation officers in the Probate and Family Court.[5]

In the 1960's and 1970's, probation officers were directed by some judges in the Probate and Family Court to do one of two things: either to investigate specific matters or to enforce support orders. These officers conducted information-gathering sessions with litigants, usually aimed at determining what amount of support was owed and how arrears would be paid because support (arrears) was the issue targeted by the original legislation. Often, the probation officers met with a father or husband to ascertain arrears and to address ways to pay support. Sometimes these officers negotiated agreements, usually regarding payment of arrears. This investigatory function expanded beyond support into child custody and visitation issues when fact-finding and reporting to judges went beyond meeting with litigants, to include contacting outside sources such as schools, doctors, or the Department of Social Services, or evaluating specific situations or allegations based on extrinsic evidence. The probation officers reported to the court when asked to do so. The primary purpose was to save judges' time by collecting and reporting specific information to a sitting judge.

Some judges in the 1970's, in particular Judge Ernest I. Rotenberg in Bristol County, advocated use of officers to "mediate or negotiate" in pre-trial situations; the stated purpose was to resolve issues or cases prior to judicial intervention.[6] Judge Rotenberg saw the benefits in terms of the relationship to pre-trial settlement, referring to statewide data which counts cases by type, by whether or not each case is contested, and whether or not the case settles without trial.[7] High settlement rates prior to hearing or trial were viewed widely among judges and members of the family law bar as a measure of successful intervention, particularly in cases of family dissolution where custody of children is involved.

During the 1980's, the role of the probation officer changed and expanded. In part, this was because caseloads increased.[8] Guidelines published by the Office of the

Commissioner of Probation (OCP) in 1984 also had an impact since they helped to establish a more uniform practice throughout the Commonwealth. Another major change in practice, specifically in case distribution, followed the implementation of the Massachusetts child support guidelines. This change was formalized in 1988, when the Department of Revenue (DOR) took over the bulk of support enforcement. As a result of these and other changes, the focus of the work, as well as expectations of the role, has changed. The allocation of officers' time has shifted away from support enforcement to investigation and negotiation. The range of expertise necessary has broadened with the rise in case numbers and the increasing variety of disputed issues. Today's officers routinely are expected to handle cases involving allegations of physical and sexual abuse, to review Supplemental Rule 401 Financial Statements, to interview emotional clients and process their claims, and to issue reports and recommendations that, though many are verbal, can be as long as sixty written pages.

The staff members working in the family service office are probation officers, members of the Massachusetts Probation Service working under the authority of the Commissioner of Probation. Throughout the state they are referred to both as probation officers and as family service officers. The common use of two different terms reflects the variety of different perceptions people hold about this job. This report uses both terms with the understanding that these staff are formally titled probation officers but are also commonly referred to as family service officers.

II. STATUTORY AUTHORITY AND CURRENT APPLICABLE RULES AND STANDARDS

The general statutory authority for family service office intervention is found in Massachusetts General Laws, chapter 276, sections 85A & 85B. Section 85A states that probation officers have authority to "examine all records and files" in various types of cases in order "to ascertain whether the persons to whom payments of money should have been made regularly received the various and definite amounts provided for...." Section 85B, concerning powers of probation officers regarding contempt, provides that a probation officer may make recommendations to the probate court, where there are dependent minor children, for the betterment of the conditions of said dependent minor children and to ascertain when requested to do so by the court the moral and general conditions surrounding said dependent minor children and shall report the result of such findings to said court.[9]

There is no comparable directive statute empowering family service officers to perform "mediation," although G. L. c. 276, § 85A refers to "other duties imposed... by the justices of the probate court." Nor is there statutory authority for requiring dispute intervention. However, Probate and Family Court Standing Order No. 1-88 directs: "Maximum usage is to be made of Family Service Officers for mediation of contested

matters in pre-trial conferences, contempt proceedings, and motions seeking temporary orders."[10] Prior to legislation enacted and approved in 1993, the Commissioner of Probation had authority to "establish the standards and duties of probation work, including methods and procedures of investigation, mediation, supervision [and] case work ... subject to the approval of the chief administrative justice."[11]

Under reform legislation, the authority for issuing rules and standards governing family service office interventions is retained by the Commissioner of Probation, and written approval is required by the Chief Justice for Administration and Management, but authority has been expanded to include certain judicial tiers of administrative justices in the Trial Court Department.[12] Court reform legislation grants the authority to "define the duties" of all non-judicial personnel to the Chief Justice for Administration and Management, to the Chief Justice of the Probate and Family Court, and to the First Justice of each division of the Probate and Family Court.[13]

Standards issued pursuant to statute describe several functions performed by the family service officer, including dispute intervention and investigation. *Standards and Forms For Probation Offices of the Probate and Family Court Department* will become part of the *Standards and Forms* published by the Office of the Commissioner of Probation effective July 1, 1994. The 1994 Standards (hereinafter *Standards*) will repeal and replace *Standards* issued in 1984, under which family service officers operated during the time this report was written. The 1994 *Standards* are approximately 24 pages, plus forms.

The 1984 *Standards* define the purpose of mediation as "to identify the areas of dispute between litigants, to act as intermediary in the resolution of these differences, and to report the outcome to the court."[14] The meaning of "report the outcome" is amplified in 1984 *Standard* 4:07 under which the family service officer is to make recommendations concerning unresolved issues to the court when requested to do so by the judge.[15] The 1994 *Standards* have dropped the term mediation and adopted the term dispute intervention which is defined as "opportunity to the litigants to resolve their own differences" and for the family service officer "to identify the areas of dispute..., to assist in the resolution of differences and to report the outcome to the court; which in some cases may require the presentation of a probation officer's recommendation to the court on unresolved issues."[16] The 1994 *Standards* define the purpose of investigation as "to gather information on matters referred by order of the court, to assist the court in making timely, informed decisions on such matters."[17]

Both 1984 and 1994 *Standards* make clear that, whether acting as facilitator or as investigator, the officer is an agent of the court, acting at the behest of the court, and under supervision of Office of the Commissioner of Probation. *Standards* concerning intake and record-keeping mandate that officers collect specific information in each role, as well as any additional information ordered by the court, that they keep files in a standard format, and that they instruct litigants about what role and function they will provide in each case.[18] *Standards* require that the investigatory function should initiate

by court order and involve a written report, described as "formal report," "summary memorandum" or "closing summary report."[19] Records and files kept pursuant to *Standards* always are available to judges.[20] Written reports may be available to attorneys and/or litigants under certain conditions.[21] Reporting to the court is also addressed by *Duro v Duro*, 392 Mass 574 (1984).[22]

III. DESCRIPTION OF CURRENT FAMILY SERVICE OFFICE PRACTICE

Of the more than 1,000 probation officers in the courts of the Commonwealth, approximately 115 serve in the Probate and Family Court. Each of the fourteen counties has a Probate and Family Court and twelve of the fourteen have a family service office.[23] Every probate probation officer or family service officer must meet hiring criteria and most have relevant educational background. Family service officers responding to a recent survey indicated that all of them had a bachelor's degree, 70% had some education beyond a bachelor's and nearly 33% had completed a master's degree.[24]

On the job training is provided to family service officers but, with some exceptions, is not mandatory.[25] However, most do choose to attend programs and a significant number of officers have acquired extensive training. Nonetheless, despite it's beneficial impact, training alone does not guarantee adequate job performance. Indeed, significant variation exists from office to office in level of performance. While most do an excellent job, some are in need of higher performance expectations or closer supervision. An important tool, in this regard, is a clear set of standards for job performance.

The Office of the Commissioner of Probation is responsible for developing and overseeing standards statewide; the recently issued *Standards*, drafted by a committee of probate probation officers, working under the authority of the Commissioner, are a very important contribution. The *Standards* provide a good basis for closer supervision and monitoring.

The parameters of family service practice are influenced strongly by the needs and expectations of the judges who sit in each county or court. Thus, the practice varies considerably from county to county.[26] In most counties today, particularly in those where the number of cases and the number of *pro se* litigants are high, cases referred include divorce, abuse prevention,[27] paternity, custody, support, visitation, and contempt issues. Cases are generally referred at time of initial appearance and prior to court hearing. The family service office manages daily case flow, summarizes issues for efficiency, and offers litigants a forum to negotiate a resolution created within the context of facilitated, private discussion rather than through litigation.

In almost all matters, and in almost all counties, the parties are given the opportunity to reach full or partial agreement. In virtually every court, settlement is not required but participation in the process referred to as "mediation" is required and arguably not voluntary.[28] In most cases, the officer is expected to be prepared to report or make recommendations to the court. While the *Standards* specify that such a report should concern unresolved issues, in practice, the content of reports vary. In the event of partial or non-agreement, depending on the court or the judge, an officer's report to the court may consist of factual data, opinion of the officer or someone contacted by the officer, or merely a statement of the case translated into legal language or, as one officer stated, a "summary of the issues in human terms."

Particularly when they obtain satisfactory results, judges, attorneys, officers and litigants agree that a mandated pre-hearing forum can empower litigants to participate actively in making choices and decisions which affect their lives profoundly. According to one judge who responded to an interview question, "litigants are more likely to like their agreement and be able to fulfill its terms if they reach it themselves. They certainly know the particulars of their situation much better than can ever be represented in court."

Family service office procedures are organized to respond to the needs and expectations of judges. The degree to which judges utilize officers varies considerably, partially due to such factors as the number of staff and the number of cases, as well as types of cases referred by judges or assistant registers for intervention.[29] *Standards* require, and most judges and family service officers agree, that judges make case referrals. However, because of the large number of cases, it is the practice in most Probate and Family Courts to refer for "mediation" all cases of certain types, prior to any contact with a judge. Initial referral to dispute intervention may be initiated by a judge during hearing, but is most often by the clerk or the assistant register, or in some cases by letter prior to hearing or appearance in the courtroom.

Judges vary in the degree to which they require or accept officers' recommendations. Some judges admit reports or recommendations into evidence in a formal or informal hearing, and some refuse to allow either oral or written reports. A recent Massachusetts Continuing Legal Education publication, as well as the Task Force surveys, indicates great variation among judges as to whether they seek or accept such recommendations and the weight they accord such recommendations.[30] Reports or recommendations may derive from sessions 20 minutes to 2 hours in length or from several months of investigation.

This report views mediation or dispute intervention, the term adopted by the 1994 *Standards,* as divided into a mandatory information-gathering session and a non-mandatory negotiation session. Mandated dispute intervention is designed to assist litigants to organize and resolve disputes prior to court hearing. In the case of unrepresented parties, the family service officer may provide a vital service to litigants by explaining the court process, assisting with the filling out of forms and referral to the

Lawyer for the Day Program or to community services.[31] They are also in the position to listen and to respond to litigants in a manner that helps them to cope with what may be an emotionally overwhelming process.

The intervention service also exists to respond to the needs of judges. To accomplish these various purposes, the parties are directed to meet with a family service officer who collects information from an intake form, from Supplemental Rule 401 Financial Statements and other pleadings, and from an interview. The officer may provide litigants with information about the dispute intervention process or the courtroom process, or about legal and other resources. Officers are authorized to assist in filling out forms when necessary. The officer conducts a conference with the parties, separately or together, and/or with their attorneys. The officer is required to complete intake forms, and to collect and write information about the dispute, including litigants' interests and positions, and their statements of allegations relevant to the dispute, all of which are maintained in the case file. The officer may assist in negotiating and preparing agreements resolving some or all of the issues presented. If an agreement is reached, it must be written and signed.[32] According to the *Standards*, the officer is required to be prepared to make a recommendation to the court as to unresolved issues, not to be offered unless specifically requested by the judge.[33] No requirement for same day reporting is specified by the *Standards*, but in practice, the report is oral, in court and on the record, unless the judge seeks off the record communication or reads the file notes.

Dispute intervention duties, and the role the officer plays, must be distinguished from the investigatory duties and role. The difference between these two roles is not always clear to the public because both are performed by a family service officer and involve similar elements. Confusion may develop when an officer negotiating with the parties, performs duties associated with an investigatory role (e.g., contacting collateral sources outside the session to test the veracity of litigants' statements; reporting opinions to the judge based on information gained in sessions.) The following outline of characteristics of the dispute intervention process and the formal investigation process attempts to ensure that this report helps to clarify any confusion about the roles.

Dispute intervention cases are characterized by these factors: 1) they are scheduled on a daily motion list and parties are required to return to court that day for entry of full or partial agreement or for hearing, 2) involvement of the family service officer is limited to matters properly before the court (i.e., a matter may be added to an agreement by the parties but cannot be approached by the family service officer or decided by judicial order if not properly raised and served) and 3) the officer acts as a facilitator, collecting information, perhaps negotiating resolution, and/or reporting to the court.

Investigation is characterized by these factors: 1) there is usually a referral form or language within a court order, signed by a judge, directing the family service office to

conduct an investigation into specifically identified areas, often involving children; 2) the officer is ordered to gather facts, interview a wide variety of people, obtain relevant records, and report back to the court within a 30, 60, 90 day or longer period unless emergency requires immediate action; and 3) the report must be in writing and is subject to cross examination and rebuttal.

The issues most commonly referred for investigation concern custody, paternity, visitation with children and the need for supervision thereof, financial or employment analysis, petitions to marry, adoption searches, removal of a child from the state, requests from out of state courts, indigence determination, referral and/or monitoring of court-ordered tests (e.g., medical evaluation, drug screening, genetic marker).[34] Finalizing the investigation may include case conferencing and preparation of written reports and of testimony. While an agreement or resolution of the case may emerge from an investigation, the purpose of investigation is not agreement but to inform the court, usually concerning on-going litigation.

The remainder of this report addresses and makes recommendations concerning dispute intervention practice (as opposed to investigatory responsibilities) provided by probation officers in the Commonwealth's probate court system, Further evaluation and review of investigatory procedures is recommended.

RECOMMENDATIONS TO IMPROVE COURT-ORDERED DISPUTE INTERVENTION

I. SUMMARY

The Task Force found that the pre-hearing dispute resolution process could be improved and the opportunity for bias reduced by 1) renaming the process; 2) delineating and clarifying the role of probation officers (family service officers); 3) providing procedures and protocols to prevent potential bias; 4) educating litigants and establishing on-going evaluation; and 5) increasing training of officers, judges and other court personnel. This summary describes the basis for the recommendations made by the Task Force.

The common use of the term "mediation" to describe the dispute intervention process has been misleading, particularly for litigants. Pre-hearing dispute intervention, as practiced in the Probate and Family Court is not defined by the same elements as those present in mediation as practiced outside the court. While it is not the policy to force litigants to make an agreement, participation in dispute intervention is required by the court. Dispute intervention, including negotiation between the parties that may happen during this process, is not confidential. Oral reports to the judge are made and proper handling of cases mandates that a case file and notes be maintained which are available to the judge. Although the process does not occur in the public realm of the courtroom, neither does it always occur in a private space. Lack of facilities means that it sometimes occurs in public rooms or corridors and sometimes in the presence of third parties. Some judges require the officer to provide a recommendation even when the session did not result in agreement. Occasionally, agreement is required by a judge; often it is expected.

The role of the judge and the family service office ought to be more clearly delineated and explained more fully to avoid confusion as well as the potential for abrogation of rights. In advance of the dispute intervention process, litigants should be informed, orally and in writing, that participation in the process is not voluntary, that litigant information revealed is not confidential, that the family service officer should be impartial but is not neutral, and that dispute intervention services are a court-centered process.

Blurring of the boundaries between a dispute intervention role and an investigation role may cause serious consequences for litigants. A facilitated negotiation session can evolve into something quite different when one or more of the

litigants alleges something which requires investigation.[35] The views of judges, family service officers and attorneys vary greatly on whether or not collateral contacts are appropriate in a negotiation setting. Some judges and family service officers feel that litigants should be informed at the beginning of a session that there are mandated reporting requirements and that if the safety of children is at issue, investigatory phone calls may be made. They feel litigants should also be informed that calls to confirm or clarify information may occur, although many add that they solicit litigant approval for each call before the call is made. Under these circumstances, some judges and family service officers believe collateral contacts should be allowed because they greatly assist the dispute intervention process. However, other advocates, judges and family service officers disagree and feel that collateral contacts are inconsistent with the spirit of a negotiation. They also argue that such contacts are part of the investigation function and must only be performed under a judge's order and in accord with the other procedures applicable to a formal investigation process. They believe that clear -- or clearer -- boundaries between negotiation and investigation must be established.

The family service office plays a large role in the handling of many Probate and Family Court cases and litigants are mandated to cooperate with these services. Resolution of cases is affected by some of the unique aspects of the dispute intervention process and it is therefore particularly important that there be clear and consistent guidelines and procedures so that litigants throughout the court system are treated similarly. Litigants deserve a clear statement about the authority of the family service officer. Although dispute resolution is conducted by officers who are not judges, they claim the mantle of judicial authority when they predict, rightly or wrongly, what a particular judge will say or do in deciding a particular case or issue. Litigants may also perceive such authority even when no direct claim is made.

Other hazards for litigants involve potential loss of procedural and due process rights, and loss of substantive gains made through law reform efforts. If an agreement, reached during the dispute intervention process, is reviewed by a judge, he or she applies evidentiary rules, statutory and case law, and standards of equity and fair play. Any outcome that comes before a court is on record and subject to appeal, and the actions of the judge may be subject to review by the Judicial Conduct Commission. However, the dispute intervention process, where an agreement is first formulated and shaped, is private. The dispute intervention session itself, where initial positions may be established or opinions formed, is not subject to any appeal, and grievance is not accessible even when a litigant can identify bias.

For example, there are major public policy concerns about mediating family matters involving domestic violence when mediating means avoiding judicial involvement:

> *Mediation is a private process; the intimate details of a relationship are kept out of the view of the public. This aspect of mediation is one reason it was so quickly incorporated into a court system in which family matters*

are considered private and more appropriately resolved in a "non-adversarial" setting.[36]

Litigants are often unfamiliar with the Probate and Family Court system, especially if they appear *pro se*.[37] Some courts explain services through written materials developed by the individual office, and most officers offer oral explanation. All courts need to educate litigants about the services provided by the family service office and materials that are uniform should be produced for display and distribution. Litigants who do not know what is happening to them, or why, will be less likely to participate and may be less satisfied with the results. Mechanisms for ongoing evaluation of services should be established and monitored to ensure that litigants are satisfied with the process and that agreements they negotiate are fair from their perspective, as well as from the court's.

Family service officers as well as the people who supervise their activities (judges and Office of the Commissioner of Probation staff) need to provide and participate in training which creates consistency in terms of expectations for performance, duties and case results. Advocates need to maintain an active role in policy development as the services continue to evolve. Litigants must become educated consumers, as well as participants, in evaluating the services.

Many of the concerns addressed herein apply generally to all litigants who participate in court-ordered dispute resolution. However, dispute intervention at the Probate and Family Court generates additional and sometimes unique issues of concern because the court is the only forum which routinely decides intrafamilial disputes, where at least one-half the litigants are female, and where the interests of parties not present, such as children, often are not represented directly. The court has a responsibility to devote increased resources for ensuring that court-sponsored pre-hearing dispute intervention, as an alternative to litigation, is a consistent, fair and accountable process that is useful to litigants as well as to the court.

II. RECOMMENDATIONS

A. RENAME THE PROCESS

1. Change the name mediation to dispute intervention

Mediation, as usually defined outside the court, implies a voluntary, confidential process conducted by a neutral third party.[38] The mediator helps the disputants negotiate an agreement by framing issues, determining interests,

and generating options. The overriding objective of mediation is to empower the parties to reach an agreement. Such an agreement is assumed to resolve differences of the parties, perhaps permanently, perhaps fairly and equitably, perhaps in a mutually advantageous (or disadvantageous) way, but, at least, in a mutually agreeable fashion.

While the process in Probate and Family Court shares some of the characteristics described above, the process commonly called "mediation" by the family service office must not be confused with traditional mediation as practiced outside of the court system. The service currently provided and described as "mediation" by the Probate and Family Court is designed to resolve or organize disputes prior to hearing and to reduce courtroom litigation.

Court-mandated services can be participatory but they cannot be truly voluntary. Nor can they be confidential as long as reporting to the court in some form is a common practice and information in files is available to the court. For some judges, report to the court is the sole or primary purpose for referral to family service. As agents of the court, family service officers seek to remain impartial, but are not neutral, as judges themselves are impartial but not neutral.[39]

This does not imply that court personnel are indifferent to the benefits of negotiated agreements; in fact, most family service officers (as do most judges, attorneys and litigants) believe strongly, particularly when the process works well, in the benefits of their work for litigants, as well as for the court system.[40]

The term dispute intervention has been adopted for use in the Probate and Family Court Department under 1994 *Standards*.[41] This eliminates the use of the term "mediation." A swift and complete change to the new terminology is warranted.

B. DELINEATE AND CLARIFY THE FUNCTION OF THE FAMILY SERVICE OFFICERS

2. Clarify services and notify litigants.

The majority of a family service officer's time is spent in two categories of service: dispute intervention (gathering information and negotiating) and investigation. Although family service officers may have a clear picture of the differences between the two, litigants and advocates often may not. One of the reasons for the confusion between services is that each may involve the same or similar actions, such as meeting with the parties to review verbal information or documents, making third party contacts, reporting or making recommendations to the court when asked to do so by the judge.

The distinction between dispute intervention and investigation can be blurred further by the practice (common to most courts) of referring all cases of certain types to family service prior to hearing. In many of these cases, the family service officer will assess and clarify the issues, and will evaluate the potential for partial or full conflict resolution by agreement. This is the beginning of dispute intervention. However, some cases may be referred for investigation either at the beginning of the case or later when, in the course of providing dispute intervention services, a family service officer receives information that requires investigation. A switch to investigation should only occur upon order of a judge. Litigants should be made aware that a judge has ordered an investigation and that an investigation has different ground rules than does dispute intervention.[42]

Because dispute intervention and investigation are different functions, they should not be combined in the same case unless a judge so orders and the litigant is clearly informed. While most courts separate the functions, the Task Force recommends that all courts distinguish these functions more clearly. To encourage and formalize the distinction, when a case is referred for investigation, a form should be signed by a judge which specifies the purpose of investigation and the issues to be investigated. Some Probate and Family Court judges now use such a form and a standardized one should be developed and used in all courts.

3. Divide intervention services into two stages.

When parties are referred to dispute intervention, that process should divide into two separate stages.

Mandated information gathering stage: All cases referred by the court should be screened and an information-gathering process applied consistently through the use of standardized forms. Cases not appropriate for negotiation should be screened out and cases requiring investigation should be brought to the attention of the judge. If necessary, initial in-take and screening can be completed by requiring litigants who can do so easily to complete forms. Obviously, personal assessment is preferable, whether by trained intake personnel or by a family service officer. Meeting separately or jointly with litigants, the officer can gather information about what each litigant expects and hopes to accomplish, can summarize and clarify the dispute, and can assess the chances for negotiation. If parties are unwilling or unable to negotiate by

choice, this mandatory interview can serve as an opportunity to collect information the court requires.

Negotiation toward agreement prior to hearing: When facilitated negotiation is indicated, litigants should be offered the second stage of intervention, i.e., an opportunity to participate in negotiation toward full or partial resolution without court hearing. When litigants enter this stage, it is important that they fully understand the negotiation process and that they agree to participate freely and voluntarily. Litigants often find that a third party is able to suggest options, even when they had anticipated no possibility to settle their dispute. The negotiation phase should be an opportunity for family service officers to exercise the skills and expertise which serve the needs of litigants without pressure or demand, free of elements of coercion. If the parties do not agree to participate in negotiation, together or through separate meetings with the family service officer ("shuttle diplomacy"), they should not be pressured or forced to do so but should return to the courtroom for a hearing with the judge.

4. Regulate reports or recommendations to the judge.

Task Force members were very troubled by the practice of family service officers' making recommendations based on negotiation sessions that do not result in agreement. When an officer develops even limited rapport with litigants, facilitates or negotiates full or partial agreement, and then reports or recommends a course of action to the judge, particularly on the basis of a session which does not reach agreement, it raises serious confidentiality and evidentiary concerns.[43]

Procedures required of judges, aimed at providing protection from bias or unfairness, are not present in the private rooms in which dispute intervention is practiced. No court reporter is present, no tape is made. There is no appellate review of dispute intervention sessions as there is with a hearing before a judge. In addition, if participants proceed without attorneys, the substantive fairness of an agreement depends upon the individual facilitator's skill and impartiality, and the ability of divorcing parties to represent their own interests effectively.[44]

In some cases, family service officers provide their files to judges for review prior to hearing, though the files and information therein are not available to attorneys or litigants. Such informal communication of out-of-court statements has largely replaced the prior practice of spoken report to the judge outside of court or hearing of litigants. Nonetheless, files raise similar troubling evidentiary and due process concerns. The fact that most attorneys and litigants are

unaware of the availability of the files to judges is even more troubling. Any family service officer's recommendations or report should be made on the record.

At the very least, in a mandated dispute intervention setting, litigants must be informed that information disclosed is not confidential, and that an officer may or will be called upon to report or make recommendations to the court. Before a report is made to the court, litigants should be told that the officer will report to the court, and what will be said. Consistent practice throughout the Commonwealth can and should be encouraged.

The majority of Task Force members felt that once litigants progress from the mandated information-gathering stage to negotiating in good faith toward agreement without court hearing, a report or recommendations to the court should be limited or discouraged to preserve and nurture whatever integrity the process retains in a mandated setting. At the very least, reporting should be limited to presentation of the litigants' positions on issues, as opposed to recommendations founded on out-of-court statements.[45]

5. Investigation and fact gathering may be mandatory, but negotiation should be as voluntary and participatory as possible.

Because of the mandatory nature of family service, there is always a risk of coercion and in a coercive environment the risk of bias increases. The original position of a number of Task Force members was that no aspect of dispute intervention services should be mandatory. However, several Task Force members, as well as many members of the bench and bar, agree that a completely voluntary system is unworkable within the court system. A majority of the Task Force is satisfied that a system in which assessment by family services is mandatory, but does not force litigants to negotiate nor penalize them by the court for being unable to reach agreement, could be beneficial to litigants, could address bias concerns and could still meet the needs of the court. The following guidelines and procedures are being proposed in response to the fact that dispute intervention by a family service officer is mandatory in most courts.

6. Explain the purposes of dispute intervention to litigants.

Family service officers in a dispute intervention session usually orient the litigants to the courtroom process and describe what will happen, particularly when litigants do not have an attorney and are new to the Probate and Family Court. The officer should explain that the meeting is designed both to clarify the

process and issues for the litigants, and to clarify and organize what comes from them for the court. The first goal is to collect information from each party to develop a concise analysis of the positions and interests which may be presented to the court. The second stage, and the second goal, is to determine with the litigants whether there is sufficient common ground on any or all points to reach agreement. The family service officer should state clearly that this does not replace the opportunity for a hearing with a judge. If matters can be agreed to or if compromise can be negotiated which reflects the wishes of both parties, an agreement will be written, signed and presented to the court for review. Whether or not agreement is reached the family service officer should inform the litigants that a report or recommendation may be requested by the judge, and the officer should tell them in advance what s/he intends to say on the record. Family service officers should also tell litigants and counsel whether information collected will be reviewed by the judge.

C. ESTABLISH PROCEDURES AND PROTOCOLS TO PREVENT POTENTIAL BIAS

7. Standard intake protocol should be used to assess inequality of bargaining power between the parties.

Until now, each family service office has developed its own intake protocol. The 1994 *Standards* contain an intake form which is designed to encourage statewide uniform collection of data. Intake protocol should include (and already does include in many courts), for those litigants who speak, read and write English well enough to do so, completion of an intake form which elicits basic information, including (a) whether the parties are living together; (b) whether either is afraid of abuse or residing in a shelter or at an impounded location; and (c) whether each speaks English sufficiently to negotiate in that language. In addition, a Rule 401 Financial Statement should be completed by each party when child or spousal support or property are at issue.

Family service officers should also use intake and screening tools to identify violent or controlling behavior. The Task Force feels strongly that such a practice should be adopted statewide and has developed a model assessment which appears in Appendix D. While physical abuse clearly demonstrates an inequality of bargaining power between the parties, psychological and economic abuse also may render dispute intervention inappropriate. Language barriers, speech disabilities, mental disorders and complex legal issues may exacerbate existing inequalities, and should be considered in a family service officer's

evaluation of whether the parties have a roughly equal power to negotiate. Situations where one party is represented by counsel and the other is not may also present the potential for significant inequality.

As part of the assessment and intake process, officers should review intake forms, financial statements and other documents, as well as read the court file and those pleadings relevant to the action before the court. In cases where restraining orders are in effect, are sought, or are indicated, review should include examination of prior criminal convictions and past 209A or other abuse prevention actions by checking the Statewide Domestic Violence Record Keeping System.

8. Separate interviews should be available to litigants when there are allegations of abuse or if meeting together would make one or both feel unsafe or unable to negotiate.

Prior to meeting with litigants, an intake worker or a family service officer should ask each party individually if a joint dispute intervention session makes either party feel unsafe. If either party has reason to feel unsafe, the family service officer should interview each party individually and separately. A joint meeting may follow, once the threatened party feels safe. Separate interviews require additional time, which is justified for several reasons. The first and foremost is to determine whether a power imbalance due to abuse exists, making negotiation inappropriate. The officer also may learn, for example, that one party is incompetent or uncooperative, or might hear allegations, such as sexual abuse of children, which should be reported to the judge who may order an investigation. It is not uncommon for the officer to hear issues or allegations that exceed those stated in the pleading before the court, particularly from *pro se* litigants.

9. Family service officers should stop dispute intervention sessions and report to the judge if they determine the sessions are inappropriate.

In those courts where it is not already current practice, officers should have responsibility for identifying cases where the negotiation stage of dispute intervention is wholly inappropriate and for reporting that situation to the judge. Judges make the final decision and an order to negotiate should come from the

judge. If parties are forced to negotiate, they should not be forced to do so in the same room, particularly when safety is an issue.

Negotiation is not appropriate if a pattern of physical, psychological and/or economic abuse is identified during the assessment process, unless each party gives informed consent to continue, (i.e., each party chooses the process with knowledge of the risks involved).[46] If they consent to continue, litigants should not be forced to reach agreement.

When negotiation is not appropriate, an officer should have the right to terminate the session and return the case to court (with explanation if required) for court order or hearing.[47] Proposed orders, in simple language, told to the family service officer or written by each party, would be a useful adjunct to the negotiation process, when parties are unwilling or unable to negotiate or unable to compromise. Family service officers and parties should be permitted to terminate negotiation sessions at any point without retribution.[48]

10. Family service offices should have private, safe and appropriate meeting spaces and with adequate security.

More than half of the family service officers interviewed by the Task Force said that they did not have adequate space to perform their job functions and that litigants deserved better surroundings for dealing with difficult issues. In some courthouses, litigants are interviewed in hallways, sometimes with temporary partitions around them but sometimes with no provision for privacy at all. The facility problems most often mentioned by family service officers included: lack of privacy, cramped work space (several interviews in the same room, people overheard talking or yelling in the next area), poor ventilation, and poorly maintained work areas (rodents, insects, dirt, asbestos).

Nearly all of the family service officers surveyed reported that they were concerned about their personal safety and the safety of litigants. They worry about clients coming in armed, lack of metal detectors, and an insufficient number of court officers, isolated work areas and dangerous home visits. They described cases where litigants became violent and cases where attorneys pushed an issue or encouraged volatility.

Family service officers also reported a need for appropriate places for children to wait while the officer met with their parents. Children are sometimes forced to wait in hearing distance of parents' conversations or in hallways or other unsuitable locations. Children's waiting areas are needed.

11. Agreements reached during negotiation sessions should be presented to the court.

When litigants agree on some or all points, this agreement should be approved and signed by the litigants, their attorneys (if any) and by the officer. Agreements then should be submitted for judicial review at a hearing where all parties are present. Some judges review agreements, and hear from litigants or attorneys to ascertain that agreements are equitable and have been negotiated free of coercion. Some rely on family service officers to make that determination. Judicial review with the parties is recommended, if only to emphasize that a judicial signature creates valid and enforceable court orders subject to penal-ties for contempt of court. No agreement should be made an order of the court without a hearing or some record that the parties agree voluntarily to its terms.

Sometimes judges accept agreements, through the register, without a hearing; sometimes attorneys and parties prefer that to waiting in court for the judge to hear them. If judges, litigants and attorneys are convinced that too much time is spent waiting for the judge, the form could require litigants, attorneys, and the officer (as a witness) to sign a statement that they understand, sign freely and voluntarily, and have not been coerced.

12. Attorneys should not be excluded from dispute intervention.

Neither judges nor family service officers have the authority to require litigants to negotiate in the absence of their attorneys. Litigants who are represented should never be required to enter into court-ordered dispute intervention without their attorneys. The Task Force received reports of this occurring, sometimes even when litigants asked to have their attorneys present.

No party should be required to negotiate or accept an agreement obtained without opportunity for representation, if representation is desired. This does not imply that litigants have a right to appointment of counsel; however, the matter should be heard by a judge if the litigants decline to negotiate in the absence of representation.

On the other hand, properly prepared litigants often feel comfortable meeting without their attorneys, particularly if it saves legal fees.

13. Family service officers should not advise litigants on what the court may decide or order in a particular case.

The role of the family service officer is incompatible with attempts, however well-intentioned, to apprise or advise litigants of how the court or a particular judge will decide an issue or case. The non-coercive impartiality expected of officers is undermined by advice to the parties, particularly advice which suggests what the court will do if the parties fail to agree. When officers tell litigants information about how a particular judge will rule in order to facilitate settlement, parties may agree to a settlement proposal because they are told or believe that the proposal will become a court order.[49] Any ability to appeal is abrogated. Where the parties are unrepresented or not in the presence of their attorneys, the problem may be compounded by the appearance or perception that what is being offered is legal advice or has the judicial stamp of approval.

At times, it may be appropriate to shape litigants' perceptions of what is attainable so as to help resolve issues. In this regard, broad statements of generally accepted legal and public policy are made fairly routinely. Statements such as "the child support guidelines will not be waived" or "we will negotiate visitation, but not whether the restraining order will issue" or "sexual abuse allegations must be reported to the court and to the Department of Social Services" are commonly made, and significant time is thereby saved. However, statements such as "parents have rights to visit their children no matter what, because that is in the best interests of the children" or "joint custody is required by law and you will have to accept it" are less clearly established in law, or are contrary to law.

There is significant disagreement among members of the legal community and among judges and family service officers about what statements are appropriate in the context of dispute intervention. The amount of judicial oversight or awareness varies from court to court. Determining what is appropriate behavior or proper advice by family service officers, especially as not specified by present and revised guidelines, should be the subject of discussion by the bench, the bar, the Commissioner of Probation, family service officers, litigants, and other interested groups.

D. PROVIDE LITIGANT EDUCATION AND ONGOING EVALUATION OF SERVICES

14. Materials describing dispute intervention should be provided to litigants.

In addition to written materials, videotapes that explain dispute intervention in detail should be developed and shown to litigants while they wait for family service or for the court to call their case. Audio-visual materials would aid those litigants who cannot read and would save time currently spent on case by case presentation. Standard intake and educational materials would help screen out cases that require additional services such as translation or investigation. Videotapes provided to all the courts along with standardized brochures would aid in establishing consistency of services. Whenever possible, all such materials should be translated into the languages spoken by users of the court.[50]

Once litigants understand the process, they are often relieved to have the assistance of someone who will listen, who will help them focus on presenting relevant facts, and who will suggest compromise. Reaching agreement on issues not in dispute sometimes helps resolve contentious issues, or clarifies those that require judicial intervention. Informed participation increases the likelihood of agreement and reduces feelings of coercion.

15. Regular evaluation of services by litigants is essential.

The Task Force concludes that ongoing and impartial evaluation, using litigant feedback, is essential for improving services. A sample evaluation tool, developed by the Task Force, is included in Appendix D of this report. Such tools require on-going implementation, review and response. The effort the court would invest in establishing and maintaining an evaluation mechanism would be repaid by the information obtained.

E. INCREASE TRAINING OF FAMILY SERVICE OFFICERS, JUDGES AND OTHER COURT PERSONNEL

16. Comprehensive training programs based on consistent standards must be provided for all family service officers.

Many family service officers, on the job for many years, have accumulated vast experience. In the words of a judge interviewed by the Task Force, "I think they get short-changed in terms of the credit they receive for the high quality that they produce. Someone who has been a family service officer for ten years has done five thousand mediation which is far more than any other mediator outside of the court system." Yet, though years of high volume experience are invaluable, they are not sufficient to ensure that the quality of intervention keeps pace with the changing practice. The job of the family service officer has become a highly demanding and complex one. To do this job, family service officers need to receive ongoing training.

Surveys indicate that a large number and variety of training sessions are offered to family service officers and most have taken advantage of at least some training opportunities. According to a survey by the Massachusetts Probate Probation Association, the average number of hours of training completed by officers throughout the term of their employment is 210.5 hours in all subjects combined. They received, on average, 34.2 hours of training on mediation.

Most training of family service officers is provided by the Office of the Commissioner of Probation (OCP). OCP involves officers in designing and delivering their training. Officers also attend training sponsored by the Probate and Family Court and the Judicial Institute, as well as by agencies and institutions outside the court system. In addition, some local family service offices generate their own training programs.

To strengthen the effectiveness of this effort, the Task Force recommends more emphasis on a coordinated and comprehensive training program based on consistent job standards. Such a program would facilitate basic as well as specialized needs that arise as the role of the family service officer evolves. For example, some officers need more than rudimentary training in handling financial issues, or complex custody or abuse situations. The Task Force also recommends training for all officers on gender bias issues which have become increasingly sensitive. Because Task Force members feel that training on preventing gender bias in dispute intervention is so important, they developed a model training program which is Appendix E of this report.

The Task Force was concerned that family service officer training has not been mandatory except for training for new probation officers, new chief and assistant chief probation officers and training on revised standards. The Office of the Commissioner of Probation, which sponsors most of the training, takes the position that mandatory training can undermine effective learning for all participants if some do not want to be there and do not participate freely. The Task Force felt that family service officers need training and that those who choose not to attend might evidence weaknesses in important areas of job performance. In particular, the Task Force believes that the gender bias model curriculum should be designated as mandatory training and that mandatory training in other areas such as domestic violence should also be considered.

All family service officers who facilitate negotiation between litigants need training in skills generally thought of as mediator skills. For this purpose, it is helpful to refer to G. L. c. 233, § 23C which calls for a mediator to have completed at least 30 hours of training in mediation. Mediators outside the court are presently considering the need for standards to clarify the definition of mediator and the mediator role. Different forms of licensing and certification are under discussion and the Probation Department is participating in this dialogue in anticipation of the effect it may have on family service officers.

The courts must continue to provide training and should continually seek to strengthen the impact of training on job performance. Although training is an important element, it is by no means the total picture. The Task Force calls upon the Chief Justice for Administration and Management, the Chief Justice of the Probate and Family Court, the Commissioner of Probation, and the First Justices of each court, to participate in the creation of a shared understanding of the role of family service and a uniform practice statewide. This shared understanding will provide a solid foundation for effective training.

CONSIDERATIONS FOR PRACTICE OF FAMILY LAW IN DISPUTE INTERVENTION

I. SUMMARY

The Task Force identified areas of family law with particular potential for gender bias. The Task Force urges that reform be considered in the legal principles underlying cases involving 1) violence; 2) custody of children; 3) paternity acknowledgment or adjudication; and 4) financial issues including financial statements, alimony, property division and child support.

Those traditionally disempowered in our society should not be disadvantaged further in the dispute intervention process. The courts must respond actively and affirmatively to address the dangers of mediating disputes involving violence or threat of violence, and the need for abuse prevention. Gender bias in child custody decisions should be minimized and financial and child-related issues should be separated as much as possible. Proactive measures should be established to reduce the risk of financial disempowerment that results from partial or non-disclosure of assets or income.

II. CONSIDERATIONS

A. CASES INVOLVING VIOLENCE

One of the most significant lessons of the past ten years is that the number of battered women in our society is much higher than previously recognized. One out of two women will experience domestic violence in her lifetime.[51] Domestic violence is a major cause of injury to women and the most common reason women seek emergency medical care -- outnumbering rapes, muggings and accidents combined.[52] It also contributes substantially to injury of pregnant women.[53] In addition, mounting statistical evidence shows a high correlation between witnessing or enduring battery as children and 1) health, school, and behavioral problems, 2) violence toward self and others, and 3) incarceration.[54] The correlation between battering and homicide has received substantial media attention, and statistics show that in 1992 a women was

murdered by her batterer every eight days in Massachusetts, up from every twenty-two days in 1989.[55] However, researchers estimate that only a very small proportion of domestic violence incidents is reported to the police.[56] Domestic violence is pervasive and destructive, but despite the recent media attention, it remains for the most part a private crime.

Given the known statistics on domestic violence, it must be assumed that significant numbers of battered women and children flow through the Massachusetts Family and Probate Court system without being identified as such. It can be surmised that there are three types or groups of battered women who come through our court system. The group representing the smallest number of women are those seeking restraining orders under G.L. c. 209A, the abuse prevention statute. These are women who have identified themselves as "battered" and who have decided to pursue the protection of a court order to prevent further abuse.

The second group includes women who raise allegations of abuse in court pleadings. These women, for instance, file for divorce on grounds of "cruel and abusive treatment", or raise allegations of abuse in support of motions, without requesting restraining orders.[57]

Unfortunately, there is significant evidence that the largest group of battered women in our court system do not disclose abuse. Some women may feel that they are not in immediate danger and therefore do not seek protection. Others fear disclosure of violence will lead to retaliation, reduced access to their children, or financial hardship. Others are humiliated and embarrassed. Some have not yet identified abuse as a problem, and so do not know they need help or that available remedies exist. Some may have filed for protective orders in District Court and then find themselves defendants in Probate and Family Court actions. Whether plaintiff or defendant, they may not realize the relevance of violence to the Probate and Family Court decision.[58]

To more fully understand why women may not disclose abuse, note how domestic violence as a "private" crime is usually a well kept secret between the parties. Batterers often lie about, deny, and minimize or justify their violence. Battered women come to court knowing they will present a version of their relationship that will be denied by their partners. Sometimes women are convinced, correctly or otherwise, that keeping violence secret is the only way they and their children can remain safe.

In order to protect victims of violence in our court system, we need to create guidelines that protect battered women, children and men, whether or not they have identified the abuse by seeking a 209A order or raising allegations of abuse. These guidelines should protect abuse victims, without compromising the needs or rights of their partners. We must create an environment which encourages disclosure and supports safety upon disclosure.

There are a variety of things that will bring about this environment. Well trained personnel can identify, assess and assist in referring cases involving domestic violence. This should include referral to sources which can provide emergency and long-range safety planning and civil and criminal legal planning. Court-mandated dispute intervention must foster true negotiation between parties whenever negotiation is possible. Uniform tools available to family service officers will strengthen their ability to evaluate and to develop a systemic response to allegations of abuse. (See Appendix D) Family service officers must identify cases in which dispute intervention is inappropriate or dangerous. Family service officer intervention must foster safe conditions for victims of abuse and avoid heightening risk to victims.

1. Family service officers must be able to identify power imbalance and respond accordingly.

Equality of bargaining power and mutual cooperation, two elements necessary for successful mediation, are lacking in domestic violence cases. Studies show that in these cases traditional mediation is inappropriate. By controlling his victim through physical and psychological abuse, the batterer creates and maintains an imbalance of power between himself and the battered woman.[59] The results of negotiation when the dynamic of domestic violence is not countered are likely to be skewed in favor of the batterer.

Because batterers often engage in verbal and non-verbal activity designed to intimidate their victims inside as well as outside the courthouse, battered women are apt to be functioning in a hyper-vigilant state, ever watchful for signs of danger. As a result, they are vulnerable in the court on physical and emotional levels.[60] A family service officer should be able to identify such behavior and effect. Any litigant who reveals abuse of self or children should be entitled to have that allegation seriously evaluated. The belief that such behavior is acceptable is intolerable.

In all cases that are referred to the family service office, intake and assessment should include questions about domestic violence. A model form for this purpose appears in Appendix D. Family service officers must be trained to identify the dynamics of abuse so that inequality of bargaining power can be addressed. If a pattern of domestic violence, child abuse or power imbalance exists sufficiently to render equality of bargaining unlikely, family service officers should not begin negotiation, or should stop negotiation once begun and report to the judge.

2. Requests for restraining orders or protective orders are not appropriate issues for negotiation.

When the only issue to be addressed is the issuance of an abuse prevention order pursuant to G. L. c. 209A, a restraining or protective order based upon abuse or fear of abuse pursuant to G. L. c. 208, § 18; G. L. c. 208, § 34B; G. L. c. 209, § 32; or G. L. c. 209C, § 15, there is no need for negotiation since encouraging compromise on abuse is specifically contraindicated. Issuance of protective orders is not appropriate for, and should not be the subject of, negotiation except in the most unusual circumstances. Massachusetts G. L. c. 209A, as amended specifically states that parties cannot be required to mediate.

In cases involving domestic violence, including child abuse, the family service officer should function in an information-gathering role, explaining to the parties that the goal is to conduct inquiry for the purpose of making a report to the court to aid in the issuance of effective orders. The officer should take steps to ensure that the victim is not interviewed or forced to remain alone in the presence of the alleged batterer.[61]

3. Allegations of abuse should not be evaluated or negotiated in dispute intervention.

Any discussion by a family service officer with a battered woman which addresses the significance or reality of a particular act of violence reported by the battered woman should be avoided. A battered woman's experience of violence should not be qualified, interpreted, or ranked in order of severity. Under no circumstances should an officer tell a woman or her partner that a restraining order is not necessary. Women should not be "talked out of" protective orders because their batterers have left the area, moved out, been incarcerated or hospitalized, failed to appear for the second hearing, or for any other reason. Determining whether or not abuse happened and whether orders should be issued are matters for the judge to decide.

No attempt should be made to get the woman to "negotiate" with the batterer for her safety. Negotiations in this context take the form of working toward getting the battered woman to behave or not behave in a particular manner in exchange for a promise of non-violence made by the batterer. Any family service officer conducting discussion of the alleged abusive incident(s),

either directly or indirectly, should be very aware of the impact that this discussion can have on the parties.[62]

4. Each party should be interviewed separately and should make an informed choice to negotiate.

There is no more highly recommended or effective mechanism for creating a safe environment for victims of domestic violence than for family service officers to see litigants separately. No negotiation should occur in cases where there has been a pattern of abuse unless both parties are informed of the role of the officer and their right to refuse to negotiate, and unless both parties separately and expressly state their desire to negotiate according to terms stated by the officer. Particularly in cases where the person alleging abuse chooses not to negotiate, the officer should consider the danger of retaliation by the abuser. Steps should be explored to protect the safety of the party alleging abuse.[63]

Physical or psychological victimization may impair the ability of one or both parties to advocate interests or to honor agreements. Parties who might not be willing to negotiate together may be more comfortable, for example, in separate sessions or formulating their own "proposed orders" for visitation schedules. While it may be appropriate to require litigants to speak with a family service officer to clarify issues, it is inappropriate for officers or the court to force litigants to speak to each other, particularly when the safety of a litigant or a litigant's children is jeopardized by meeting together.

5. Negotiation concerning collateral matters should be separated from the issues which led to a request for a protective order.

Separating issues clearly and stating that violence and the issuance of protective orders will not be negotiated can emphasize the fact that a protective or restraining order has a separate legal significance. The existence of such an order is not contingent on negotiation or agreement.

Gathering information on matters such as visitation or arrangements for the batterer to remove property from a joint residence, with litigants in separate rooms, underscores the message that the order itself is a matter of law and not negotiation. Such sessions could be postponed a few days to further separate the issues and to monitor compliance with protective orders.

6. Dispute intervention sessions should include discussion of the victim's safety.

Domestic violence cases often involve alleged conduct which threatens public as well as individual safety and/or may be subject to criminal prosecution. Even so, many victims minimize the danger of the situation as a coping mechanism. Therefore, it is crucial that the victim be encouraged to contact a battered women's shelter, safe home network, or other similar advocacy center to ensure availability of comprehensive safety planning. Some members of the Task Force raised concern about the balance between family service officer neutrality and the victim's need for safety planning and support. More discussion is needed about this so that family service officer's can maintain neutrality but play a much needed role in victim safety.

Particularly when the family service officer's role involves responsibilities to one party and/or mandated reporting requirements, both parties must give informed consent for continued negotiation of agreements.

7. Any agreement resulting from negotiation should be reviewed by the court to ensure the victim's safety and that the agreement is fair and free of coercion.

Negotiating tangential issues in the context of violence requires delicate balancing of the victim's need for affirmation that she has been wrongly injured and the batterer's desire to avoid blame. For intervention to be successful, it is critical that the victim feel empowered and that the officer clearly state that violence is unacceptable behavior subject to criminal sanction. The judge's review of such a negotiated agreement will reinforce this statement and will give the judge an opportunity to determine that the agreement is fair and free of coercion.

8. Mutual protective orders are generally not appropriate and the law requires that they be accompanied by written finding of fact.

According to case law and statutory amendment, one litigant's application for protection should not result in protective orders being granted to both litigants; the judge must enter written findings of fact if the unusual step is taken of issuing mutual orders.[64] Under current law, if the court issues mutual orders, the police must arrest both litigants in the event of further incident, which can

have a chilling effect on police and victim. It is the business of courts to determine facts and allocate responsibility. Refusal to do so in the context of family law puts domestic violence back behind closed doors. Such a strategy might reduce caseloads, but there is no evidence it reduces violence.

9. Joint custody is not appropriate in the context of domestic violence.

Family service officers should recognize that in cases involving custody or visitation, the safety of the children is related to the violence of one parent against the other. Being a good parent includes treating one's partner with respect. Violence witnessed by children has devastating effects.[65] Seeking control of the children is one of the most common tactics used by an abuser after separation to continue to harass and control a former partner. Even if an abuser has never before hit the children, the potential use of children as victims must be considered. The most frequent times women and children are at risk of injury and death are the visitation pick-up and drop-off occasions which can be used not to visit with children but to intimidate and harass.

Assisting litigants with planning child-access arrangements is an invaluable function of the family service officer. There may be no one else available to both of the parties who has the knowledge or the ability to raise the necessary issues. For many battered women the decision to keep the violence "private" ends when they become convinced that the children are at risk. The officer must not discount abuse allegations simply because these allegations are being raised for the first time in court. Indeed, a victim may disclose abuse to a family service officer precisely because of the officer's skills and position. All decisions and agreements should be influenced by the need to protect children from exposure to violence.

All too often, battered women become the target of scrutiny in cases where the batterer's primary defense includes shifting the focus from his conduct to hers. This maneuver works to confuse and complicate the issues. All too often, women are asked to explain why they put up with it or what role they played in the "violent relationship." It can be overwhelming for the woman, who unexpectedly must now explain her actions instead of working toward a goal of ending his violence. In many of these cases, the violence can be addressed by brief hearing before the court. Whenever a custody change is requested by a parent against whom allegations of abuse have been raised, the officer should inform both parties of the presumption against joint custody created by statute in these cases.[66]

10. Visitation should be negotiated to minimize the opportunity for violence.

Sometimes there is no difficulty with child access issues as long as the battered woman is not required to have contact with the batterer. A neutral drop-off/pick up point can be established, a schedule created and related logistics of visitation arrangements negotiated and arranged.

The issue of whether supervised visitation is required should be raised by the family service officer in cases when a risk to children is present. In too many cases, this issue is raised first or resolved by the judge without adequate time for serious consideration of the logistical issues involved in such arrangements. When raised before the hearing by the family service officer, the parties can consider the options and make an agreement which reflects how supervised visitation should take place, if ordered. There is no requirement that the litigants agree that supervised visitation will take place in order to make an agreement about what they will do if such an order is made. The litigants can negotiate two plans at this stage, one which encompasses how visitation will be managed if supervised visitation is not ordered by the court, and one that addresses how supervised visitation will be managed.

Believing that some visitation will take place can be comforting to a parent who may fear that the judge will take away all access to children. A child's right to ongoing safe contact with both parents is presumed and the parents are not further polarized by the false impression that the court automatically will terminate one parent's rights or that the only effective defensive maneuver is to ask for a change in custody. Finally, the litigants have a chance to hear and to consider options.

Further guidelines are necessary, particularly in cases where visitation of any kind poses a risk of serious harm to one parent or children. A group of Probate and Family Court judges and practitioners is currently developing visitation guidelines to promote uniformity in orders.

B. CASES INVOLVING CARE AND CUSTODY OF CHILDREN

The Massachusetts Gender Bias Study found that women may be willing to bargain away property to get preferred custody or visitation arrangements.[67] Women may be tempted to agree to give up rights to support or assets to avoid further confrontation. Women may be frightened enough of losing custody (with or without reason) that they are willing to bargain away all of their other rights to keep custody of the children. This problem is exacerbated when women are not

represented by counsel, and by the fact that women tend to be less comfortable in, and less committed to, sustaining an adversarial role. They frequently are at greater economic risk and have less information about marital assets and about their legal rights.[68] If a woman is not represented by an attorney, she may have no idea of what constitutes a fair support order or division of assets.[69] Many litigants, both women and men, rely on the family service officer to guide them as to what is "fair" or "reasonable."

The California report on gender bias in the courts has found that mediator biases about custody arrangements may be detrimental to interests of women.[70] Many women view joint custody as "losing", whereas many men view it as "winning". As a result, women may bargain away needed property and support benefits to avoid the risk of "losing" their children.[71]

Massachusetts statutory and case law support a joint legal custody principle, at least at the temporary order stage, in divorce actions. The 1989 Gender Bias Study recommended modifications which have been incorporated into statute in part, by amendment.[72] The principle of joint legal custody is laudable, but whether the current statutory scheme (as stated and as applied) has the intended results should be the subject of extensive study. Until such study further informs decision-making in this area, the Task Force reiterates and encourages the relevant recommendations of the original Gender Bias Study[73], and adds the following as guidelines.

11. Judges should not rely solely on the family service officer's recommendation as a basis for determination of whether joint custody is appropriate.

A family service officer's observations of parties in a short session may not be sufficient to determine who is the primary caretaker or to predict the best interests of the children. Joint custody is often a preferred choice for mediators, though Wallerstein and Kelly's findings indicate that joint custody may not be the best choice when there is animosity between the parents.[74] An officer cannot force parents to cooperate, as joint custody requires. When a judge mandates arrangements requiring cooperation, the best interests of the children as well as the interests of the primary caretaker parent, most often the mother, may be compromised.[75]

12. Judges should not base custody decisions on negotiation sessions which do not result in agreement.

The temporary order stage is the stage when family service is most likely to intervene in custody matters. If the pleading or oral allegations indicate serious debate about custody, more extensive investigation should precede a joint custody order which requires significant contact or cooperation. If assessment or evaluation, to determine which parent is the primary caretaker, is needed, the family service officer can collect information from each party and describe what s/he will report to the judge. If, however, the officer spends time with the litigants negotiating, creating compromise, and listening while they vent, s/he should not then make a recommendation to a judge. If the judge requires such a report, the officer should review the recommendation and the basis for it beforehand with both litigants and with attorneys, if any. The report should be on the record. The litigants can then object, on the record, and state why they disagree.

13. When joint custody is negotiated, workable cooperative parenting plans should be required.

Shared parenting plans, required by statute for permanent joint custody, are almost unheard of in practice. Parents deserve more choice than the present system offers, and the best interests of children and parents need more than reliance on principles which do not in themselves evoke results. The question of custody, both legal and physical, is usually resolved before court hearing, or with family service officer intervention at the temporary order stage. In helping parents negotiate agreements, family service officers tend to focus on maintaining stability for children (e.g., same school, schedule, friends) and on maintaining contact with both parents during difficult times.

In addition to analyzing which parent is or has been the primary caretaker, officers help parties clarify what they want, and what they mean by "joint" or "shared" custody of children.[76] If access to medical and educational records and a consistent visitation schedule are all that is requested, constant joint decision making is not necessary. Any agreement reached by litigants should spell out their intent, not just use words they may each understand differently. If parents are sharing care, or able to share decision-making, that intent of the parties should be stated and subject to modification. Officers should encourage parents to explore what works rather than operate in the "win-

lose" structure imposed by statutory language -- words which seldom match what litigants want or actually do. If the goal of dispute intervention is to encourage cooperative parenting, the Probate and Family Court Department should take proactive steps to educate and create a file of sample agreements (or at least a checklist of issues) available for review by litigants, and should encourage them to formulate or write what parenting arrangements (custody and visitation) would work best for each, and why.

One of the best outcomes of family service intervention, which occurs at a crucial time in family life, is to educate and prevent problems, to build communication and cooperation, and to encourage parenting skills. Custody of children is not a reward. Responsible parenting is not winning or losing. In a time of tremendous emotional turmoil, family service officers can help parents to act responsibly.

C. PATERNITY ACTIONS

14. Paternity is a legal and factual issue to be decided by the court upon presentation of competent legal evidence.

In urban counties, the number of paternity actions filed is near to or exceeds the number of divorce complaints yearly. Under Massachusetts statutes and in cases decided by the U.S. Supreme Court as well as the Massachusetts Supreme Judicial Court, children born out of wedlock have the same rights as children born within wedlock. Neither the family service officer nor the judge should deride litigants for failure to marry, or comment on marital status during hearing or dispute intervention.

Paternity should not be the subject of negotiation unless both parties wish to stipulate to it. Officers can collect information for the court, but acknowledgement is not a bargaining chip against which custody, visitation and support should be negotiated. The marital status of the parents is generally not determinative of the issues of custody or visitation and should not be used to cast aspersions upon the morals of the unmarried parents.

Whether parents are presumed to have joint legal custody after acknowledgement or adjudication of paternity (as is presumed in temporary order stage of divorce cases) is a matter which deserves legislative review. While the majority felt that no such presumption exists, Task Force members had differing interpretations of current law and agree that practice from court to court varies.

D. FINANCIAL ISSUES INCLUDING FINANCIAL STATEMENTS, ALIMONY AND DIVISION OF ASSETS AND CHILD SUPPORT.

The 1989 Massachusetts Gender Bias Study (at 20-23), in its overview of gender bias in the area of family law, found three overriding issues that consistently and negatively affect women in all areas of the family law system. These areas were access to legal counsel, accuracy of financial data, and the practice of mediation in the Probate and Family Court.

Access to legal counsel and accuracy of financial data are inextricably related to what occurs when cases are handled by family service officers. An important gain was made by another Task Force of the Committee for Gender Equality which succeeded in amending Probate Court Supplemental Rule 406, making access to counsel fees more available to litigants at the beginning of litigation.[77] The Task Force strongly recommends that attorneys and others familiarize themselves with the change in the Rule, and that the Massachusetts family law bar take on the task of publicizing the change.

Financial Statements

The Massachusetts Gender Bias Study found that assets are more likely to remain hidden, and less likely to be subject to discovery, in a dispute intervention process.[78] Women frequently do not have knowledge about their partners' finances and may have had little or no participation in financial decisions. As a result, they may not be able to assess the accuracy of financial statements filed by their husbands. Knowledge of this may encourage men to file inaccurate financial statements or to omit information about their assets or income. While litigants can lie in court as well as in a negotiation session, dispute intervention is an informal process based on trust and cooperation.[79] As a result, liars are in a stronger position in private negotiation sessions. The problem of financial nondisclosure or misrepresentation is exacerbated when women are not represented or not aware of discovery tools. They frequently are at greater economic risk and have less information about marital assets and about their legal rights.[80]

The Massachusetts Gender Bias Study found that attorneys, family service officers and judges agreed that financial statements were not sufficiently thorough and reliable. Since that time, the financial statement form has been updated and improved, and litigants more commonly are required to fill in every line. However, the accuracy of the data provided remains open to question and, according to the Massachusetts Gender Bias Study, accuracy varies by gender. Only a little over one third (35%) of the attorneys responding to the Study's

family law survey considered the husband's financial statement to be "always or often" accurate, two-thirds (65%) believed the statement to be only "sometimes or rarely" accurate. With respect to the wife, the survey found the percentages were reversed. It is important to note that the Study found that Probate and Family Court judges responding to the judges' survey had a somewhat different view, particularly in relation to the husband. One-half of the judges reported that the husband's financial statement is "always or often" accurate. Somewhat less than two-thirds (62%) of the judges reported the wife's statement is "always or often" accurate. Family service officers should be aware of these problems and should take steps to ensure financial statements are accurate and should bring to the attention of the court any questions they have about completeness or accuracy.

Since the Supplemental Rule 401 Financial Statement is THE most important document in almost all cases, completion and accuracy are essential. The Financial Statement is the basis for calculating child support, spousal support, division of property or liabilities, and the basis for modification in the future. At present, there are no automatic sanctions for either omissions or inaccuracies on the financial statement. It is the practice in some courts to refuse to hear cases until and unless financial statements are completely filled out; they are also signed by the parties under the pains and penalties of perjury. However, neither counsel nor officers have responsibility to verify the information.

15. Signed financial statements should be required and reviewed.

When financial issues are involved, the family service officer should require and review the financial statements of each party, as part of the intake stage and prior to dispute intervention. The officer should also arrange for each party to review the other litigant's financial statement, and inquire whether each party believes the other has made full disclosure. S/he should also ask about each source of income and asset, and inquire about property including pension and other deferred compensation rights.

16. Litigants should be required to provide or arrange provision of supporting documents.

Parties should be required to obtain and provide pay stubs, certified wage and benefits statements from employers and present and future values of pensions from the pension plan's trustees. The parties should be asked to

provide the names and phone numbers of persons at their places of employment with whom the officer can speak, if ordered to do so, regarding accuracy of wage, benefit and pension information. Valuation of pensions is a complex and technical area and the officer should not take at face value a number placed on a financial statement. Unless the officer clearly understands the distinction between defined contribution plans and defined benefit plans, for example, s/he should tell the parties that these may be valuable assets of the marriage, and recommend they seek legal advice about division. A family service officer cannot tell litigants what a fair division entails, but s/he can tell litigants to seek advice and can report to the court that the financial information is incomplete.

17. Counsel for the parties should be expected to take steps to verify Rule 401 financial statements.

Every financial statement contains not only the signature of the litigant but also a place for the name and address of the attorney who prepares the document. The 1989 Gender Bias Study stated,

> *The signature of an attorney on a financial statement constitutes a certificate by the attorney that he or she has read the financial statement and, after reasonable inquiry into all relevant facts disclosed therein, to the best of his or her knowledge, information, and belief, the financial statement is accurate and complete as filed. If the financial statement turns out to be incomplete or inaccurate, and the attorney knew or should have known of the omissions or inaccuracies, sanctions against counsel may be imposed.*[81]

Judge Edward M. Ginsberg, co-author of *Massachusetts Family Law Guidelines*, also recommends that attorneys sign financial statements, "Increasingly, judges are holding the parties to a fiduciary standard and insisting that counsel be accountable for the contents of the financial statement of the client."[82]

Many judges and attorneys involved in or interviewed during the preparation of this report disagreed. To ask counsel to be accountable was characterized as an "unfair burden" and to ask counsel to certify the information "would unnecessarily expose attorneys to charges..."[83] Family service officers also believed it was unfair to require this of them, and one judge said to ensure completeness of financial statements was beyond the officer's role. Task Force members who were also family service officers reported that they review all financial statements to be sure that they have been completely filled in and signed and to spot gross misstatements that can be identified in a quick review.

Some also ask each party to comment on whether they see any misstatements in the other party's statement.

Nonetheless, many Task Force members feel that it is incumbent on counsel, as officers of the court, and on family service officers, as agents of the court, to act affirmatively and aggressively to ensure completeness and accuracy of financial statements. Counsel can take steps to verify financial data for their own client as well as the opposing party. Counsel can send financial statement forms to their clients prior to a court date so that last minute preparation does not contribute to error. When an attorney is aware that false statements or omissions have occurred, s/he should take the steps mandated by the Code of Professional Ethics, designed to prevent attorneys from knowingly participating in fraud on the court.[84] The court should not hesitate to sanction attorneys who remain purposefully unaware.

Courts require filing of financial statements whenever any action is filed which requests financial relief. Particularly when parties are *pro se*, both parties may be required to wait while each party fills out every line on a financial statement, without regard to whether it takes hours or minutes. Such practice does not support accuracy and completeness of information, and penalizes the party who has complied. Any litigant not providing complete information in a timely fashion should be sanctioned, and officers should be able to tell litigants exactly what is required and what can occur if a litigant does not comply.

Statute and case law impose on litigants a duty to disclose and the duty to value what the other party discloses. In some cases, agreements or trials based on a valuation that is grossly and materially understated or designated as of "uncertain value" may be set aside as a product of fraud and/or misrepresentation.[85] However, the majority of abuses in this area go unnoticed because there is no uniform mechanism for requiring accurate and up to date financial information, particularly when one or both parties is unrepresented.

One family law attorney suggested a rule requiring parties to any hearing involving child support or alimony to exchange prior to hearing: a) most recent pay stub; b) most recent federal income tax return; and c) most recent W2 and 1099's. The same attorney also suggested that rules can be amended to place parties under an affirmative obligation to obtain and provide pension plan descriptions and account statements.

Alimony and Division of Assets

The 1989 Massachusetts Gender Bias Study raised concerns about whether property division and alimony should be negotiated by family service officers, on the basis that most family service officers do not have the legal and financial background to handle such disputes.[86] Some members of the Task

Force agree with these concerns. Others believe that to say that they who negotiate the custody of children are not capable of deciding property issues is in itself indicative of a societal bias which places property division above issues relating to children.

However, it may be fair to say that officers are not fully trained nor comfortable handling property issues.[87] Data from the Massachusetts Probate Probation Association 1993 survey indicates that of the total 210.5 hours of training provided for officers, only 15.4 hours, or 7.3%, is devoted to financial issues. When interviewed, most officers stated that they feel less prepared when dealing with financial issues apart from child support.[88]

It is impossible to say whether officers are less comfortable with financial than child-related issues because they receive less training or because they have been taught, as we all have, that child-rearing skills are easier to master than financial management skills. However, since they routinely review and evaluate cases which involve financial issues, more training in how to spot issues and recommend follow-up is essential.

18. The family service officer should not calculate the amount of child support and then characterize some of it as alimony.

Although payments that are characterized as child support are not considered income for tax purposes, they might have other tax-related consequences. Because child support has no tax status there may be a consequence, such as losing a dependent exemption to either party. Since the guidelines are based on gross income, it is critical that the officer fully understand the meaning of this term. Where a party is self-employed or has other income reported on Schedule C of the federal income tax return, arriving at an accurate "gross income" figure can become complex. The officer should report to the court when calculating gross income is difficult. The court may find it appropriate to require additional information.

With respect to alimony and asset division, tax consequences apply which are technical and beyond the scope of a brief dispute intervention session. This is particularly true when the judge orders negotiation at the pre-trial stage, and trial is to follow if the parties cannot agree. The child support guidelines state that "so long as the standard of living of the children is not diminished, these guidelines do not preclude the court from deciding that any order be denominated in whole or in part as alimony..."[89] As soon as any payment is called alimony, it is taxable to the payee. Calculating the effect of alimony may be beyond the expertise and time constraints of dispute intervention. Therefore, the officer generally should not calculate alimony nor

participate in bargaining away alimony.

The tax effect of allocating the dependency exemption to one of the parties must be considered. The transfer or division of assets or liabilities, particularly where value is difficult to ascertain, where capital gain or bankruptcy is involved, may be beyond the officer's expertise or time available. Property settlements are not subject to modification, and the officer should not make a recommendation unless s/he completely understands all the ramifications of such recommendation. The officer must be aware of and sensitive to such information and, at minimum, recommend that the parties seek legal advice and, if called upon to do so, present recommendations to the judge.

Child Support

Family service officers are trained to apply Massachusetts child support guidelines and generally do so without difficulty. They address child support issues by reviewing the Financial Statement of each party; in some cases, further exploration with the parties is necessary to elicit needs, assets, income or liabilities. Often the parties agree to some of the facts presented, such as where one or both work, how much each earns, and what the expenses are. Once basic information is available, the child support guidelines address the issues in a fraction of the time it takes to hold an evidentiary hearing.

19. Custody should be a threshold issue and not negotiated together with child support.

Negotiating financial issues together with issues involving children may disadvantage women, especially if women will agree to give up property and support to secure custody.[90] Women may be prepared or persuaded to agree to less support or agree to forgo a wage assignment as a way of preventing or de-escalating a custody dispute.[91] Family service officers as well as judges generally are, and should continue to be, sensitive to this possibility and counteract it. The child support guidelines have been very successful at minimizing the mixing of support and custody bargaining, and this issue now arises most often when a non-custodial parent knows that shared physical custody may change or eliminate application of the child support guidelines. Some officers feel that straightforward application of the guidelines up front defuses custody issues. As a method of evaluation, the officers can ask each litigant which issue is most important to them and plan intervention strategy according to responses.

20. Once a decision is made about custody, support should be calculated according to the child support guidelines.

A problem cited by the Massachusetts Gender Bias Study was the fact that women will agree to less child support than would be prescribed by the Commonwealth's child support guidelines.[92] Since the 1989 Study, courts and family service offices not already doing so have begun to apply the child support guidelines more consistently. The practice should be uniform in all courts and all cases. Deviation is necessary for some cases, but a pattern of deviation must be available for challenge by litigants and counsel. Judges should issue statutorily required findings to document deviation from guidelines amount.[93]

21. Agreements signed by parties should specify reasons for deviation from guidelines amount.

A written agreement which specifies reasons for deviating from the guidelines provides proof that litigants have been informed about guidelines. A written agreement also provides a record in the event Providing litigants an opportunity to reach partial or full agreement in lieu of, or in addition to, judicial resolution may be sufficient. It is generally perceived that settlement levels tend to be higher on the day of hearing and just outside the courtroom, but the legal community continues to debate whether agreements crafted in the shadow of the courtroom raise the quality of intervention, and whether officers who are not judges should play a major role in resolving cases. of future litigation concerning the agreement. Written agreement which specifies reasons for deviation or findings by a judge make deviation from norms available for appeal.

THE FUTURE OF FAMILY SERVICE IN THE PROBATE AND FAMILY COURT

The publication of this report fulfills one of the important mandates of the original 1989 Gender Bias Study. The final recommendation in the section on Mediation in the Probate Court called for the formation of a committee to include judges, family service officers, attorneys, clinicians and clients to recommend guidelines and training for family service officers in the performance of their duties. The Task Force on the Role of Mediation in the Probate Court has spent considerable time and effort studying, evaluating and creating guidelines designed to prevent bias and encourage optimal and uniform use of the family service offices in the Probate and Family Court Department throughout the Commonwealth.

This report was prepared by working sub-groups of the Task Force through a process of discussion and circulation of draft recommendations. The process at times reflected a harmonious commitment to widely shared principles and at other times revealed discord which required the dispute negotiation skills of the participants. Consistently, the shared vision proved helpful in overcoming the obstacles.

The major impetus for creating the changes recommended in this report must come from individuals and groups who work in or use the services of the court. Fortunately, there is a profound desire of many members of the legal and court community to achieve and ensure high quality services and sensitive treatment for those who come before the Probate and Family Court. In particular, family service officers and judges are in a position and have the power to improve the overall response of the system to litigants.

There are three elements essential to the successful implementation of the recommendations in this report. The first is provision of adequate resources. The second is evaluation of services and delivery. The third is involvement of the wider legal community in expanded training and education, as well as development of future policy. All three elements depend on sustaining the vision of the future which is stated eloquently in the 1992 report of the Chief Justice's Commission on the Future of the Courts, *Reinventing Justice: 2022*:

> *In 2022 the Massachusetts justice system will be oriented to its users; the public's interest will be paramount. The courthouses of today will be succeeded by the comprehensive justice centers of tomorrow. They will offer a range of traditional and alternative processes for resolving disputes. Public trust and confidence in the courts will be restored and sustained. The doors to quality*

justice will open equally wide to all, regardless of race, ethnicity, spoken language, gender, or disability. Throughout the system, dynamic leadership, enlightened management, sensible structures and enhanced accountability will be the rule. The courts will be a full partner in those coalitions seeking solutions to society's ailments. And assistance will be available to all who require it in navigating the roads to justice.

RESOURCES

Members of the legal system, including judges, registers and assistant registers, attorneys and both represented and *pro se* litigants, rely heavily on the family service office for far more than case management. Pre-hearing dispute resolution is an extremely valuable service. However, it is a service which has evolved without the respect or resources necessary to its professional function. The services are a valuable part of the legal system and the role family service officers play in the Probate and Family Court ought to be taken more seriously and given the utmost respect by all involved. Officers need and deserve more resources, beginning with but not limited to better facilities for interviews with litigants.

TRAINING AND EDUCATION

Family service officers receive a tremendous amount of training, but need more training and, of equal importance, need to be allowed time to utilize their training. The Task Force concluded that providing training to judges, registers and family service officers together in small groups statewide would provide the cross-fertilization necessary to begin to create common understanding of appropriate practice.

RESEARCH AND EVALUATION

Although there is a clear indication of the need and desire for intervention services, the use of non-judicial personnel in fact-finding and decision-making deserves ongoing review and regulation. For the most part, this report has addressed the same-day information-gathering and negotiation services provided by the Probate and Family Court. The Task Force strongly recommends that similar review of the investigatory function be undertaken. Since investigation services suffer from the same lack of uniformity, the Task Force recommends development of guidelines for content and use of written reports by those appointed in and outside the court.

Litigants, judges and attorneys, as well as the family service officers and the various management personnel who supervise them, need to work together to develop uniformity of practice and to specify what services are available and appropriate. Officers need a more explicit statement of the extent and the limits of their authority and

attorneys and litigants need to know or at least have a reasonable idea of what to expect. An important development in this regard was promulgation of the *Standards and Forms for Probation Offices* to the Probate and Family Court Department on July 1, 1994. These *Standards* can play an important role in bringing consistency to the investigation and dispute intervention functions. There will need to be active monitoring for consistent application of these standards if their potential is to be realized.

The family service office provides an essential service in terms of case management. If research and evaluation show that litigants are better served by, and more likely to comply with, agreements developed with the intervention of the family service office prior to hearing, then the service provided is profoundly important in a number of ways. Research, discussion and review of practices are required to ascertain that services provided as an adjunct to courtroom hearing meet the standards of fairness, consistency and accountability which our legal system represents.

As the Task Force studied this issue, members realized how short-sighted is the focus on one role (family service officer vs judge) or one process (negotiation vs. investigation). The intervention system as a whole must be reviewed and the parties involved -- family service officers, the Office of the Commission of Probation, judges, attorneys, litigants -- must become active partners in improving the dispute intervention services. The family law bar must become better educated about the services and take more responsibility for addressing the inherent risks. Litigants must be better prepared to use the services in a participatory way. Judges need to develop a commonly accepted understanding of the purpose of family service, and must display respect for the role as separate, but not apart, from the judicial role. Family service officers need an active voice in policy development. The legislature should articulate an updated policy and shape its reform.

Gender and other forms of bias are reduced when clear, consistent, and fair procedures are applied equitably within a system that encourages feedback and a high level of sensitivity and competence, supported by on-going training and development. The Massachusetts Probate and Family Court has the potential to develop a model program, not only for the Commonwealth but for the country. The most exciting potential for the family service office lies in its ability to become a proactive educational system for conflict management, particularly when children are involved. Ultimately, it is the legislature and the public who must support the continued development of that role.

ENDNOTES

1. *Mediation in the Probate and Family Court: A Summary of Interviews with Probate Judges*, Task Force on the Role of Mediation in the Probate Court, Committee for Gender Equality, Supreme Judicial Court, at 3, (July 1993). See also, Methodology, Appendix B of this report.

2. *Gender Bias Study of the Court System in Massachusetts, Family Law*, Supreme Judicial Court of Massachusetts (hereinafter, *Massachusetts Gender Bias Study*), at 23-27, (1989).

3. *Ibid.*, at 26-27.

4. Commentary and recommendations in this report are directed at and refer to family service office practice in the Massachusetts Probate and Family Court and, while they may be applicable otherwise, are not intended for or addressed to any other court mediation program or practice.

5. Act of August 23, 1969, c. 771, § 3, 1969 Mass. Acts 710 (codified at G. L. c. 276, §§ 85A-85B).

6. Honorable Ernest Rotenberg, and James Casey, *A Comparative Analysis of Public Opinion of the Probate Court Trial Process: Trial vs. Pre-trial, the Resolution of Contested Cases*, at 1-2, (June 12, 1978) (unpublished twelve-page article with survey instrument attached; available from author Casey through Bristol County Probate Court).

7. Massachusetts judges collect statistics concerning disposition of cases. The data are collected monthly by court staff and reported yearly in *The Annual Report of the Trial Court*, published by the Administrative Office of the Trial Court, Two Center Plaza, Boston, MA 02108. Family service offices also collect statistics which are forwarded to the Office of the Commissioner of Probation; family service office statistics report numbers and types of cases referred to them and numbers of interventions completed.

8. For example, the *1980 Annual Report of the Trial Court*, Probate and Family Court Department, at 80, 81, states that "Divorces comprise 22 percent of the Department's total FY '80 entries, and they have...risen slowly but steadily over the past five years." That year, 209A abuse prevention petitions were up 32%; 153,080 matters were heard (up 14%), of which 26% were contested and 74% were uncontested.

   The *1985 Annual Report*, at 109-110, states, "Divorce filings accounted for 20 percent of total filings, a proportion roughly consistent with past years." (The total number filed was 23,720.) Chapter 209A abuse prevention petitions increased by 27.7 percent; total of matters disposed of was 162,432, of which 27.8 percent were contested and 72.2 percent were uncontested.

   The *1990 Annual Report*, at 34, states that, following the implementation of Chapter 310 of the Acts of 1986, "Paternity cases continued to be the fastest growing portion of the court's caseload, increasing more than 200 percent since FY '88. A related increase in contempt and modification cases, due to the increased primary caseload, was also registered. Further increased court time was used to hear custody and visitation disputes, arising out of paternity cases, over which this department has exclusive jurisdiction." The report further indicates, at 121, that the total of divorces filed was 21,406, down 5.5% from FY '89, while paternity filings

increased more than 200% in the same time period. A total 184,131 matters were disposed of, 31.7% contested and 68.3% uncontested.

9. G. L. c. 276, §§ 85A-85B.

10. Standing Order No. 1-88, #V., *Standing Orders of the Probate and Family Court, Probate and Family Court, Massachusetts Rules of Court - State*, St. Paul, Minnesota: West Publishing Company, at 784, (1993).

11. G. L. c. 276, § 99. Standards were promulgated by the Commissioner of Probation on March 9, 1984; they were then reviewed by the Chief Justice of the Probate and Family Court Department, and were made effective May 1, 1984.

12. C. 379 of the Mass. Acts of 1992, codified at G. L. c. 211B, §§ 9a, 10, 10A.

13. *Ibid.*

14. *Standards and Forms for Intake, Investigation, Mediation, Supervision of Cases Involving Support Collection and Enforcement of Court Orders, and Community Services for Probation Offices of the Probate and Family Court Department*, promulgated on March 9, 1984 by the Commissioner of Probation. Standard 5:01 states: "The purpose of dispute intervention is to provide an opportunity to the litigants to resolve their own differences; and to provide the court with information and/or recommendations as requested and/or ordered by the court." Standard 5:03 states: "The role of the Probation Officer in dispute intervention is to identify the areas of dispute between the litigants, to assist in the resolution of differences and to report the outcome to the court; which in some cases may require the presentation of the Probation Officer recommendation to the court on unresolved issues."

15. 1984 *Standards* and 1994 *Standards* both limit recommendation to "unresolved issues" and require report to the court only upon request by the judge.

16. 1994 *Standards* 5:01 and 5:03.

17. 1994 *Standards* 4:01.

18. Files are kept in a standardized format pursuant to 1984 as well as 1994 *Standards*, which also reference additional Office of Commissioner of Probation *Standards*. See, 1994 *Standards* 2:00, 2:09-2:13 and commentary; Intake (3:00, 3:02) and Dispute Intervention (5:00, 5:02) require the officer to explain the purpose and role, while Investigation (4:00) does not.

19. 1994 *Standard* 4:00 (4:01 - 4:05) and commentary; A. Formal Report: includes title sheet, legal history, litigants' and witnesses' statements regarding the issues, summation and recommendation and appendix; B. Summary Memorandum Report: may be a narrative summarizing issues, stating resolution, if any; C. Closing Summary Report: may be used when a case has been settled or resolved, and may be a separate report or part of the case chronology, and contains name of the case, date assigned, name of referring judge, issues, extent to which investigation was completed, resolution.

20. Family service office file is separate from the court file; court files are available to attorneys and litigants unless impounded, while family service officer files are not public record and not

available except to judges without court order. See *J.E.B. v S.J.B.*, Probate and Family Court Middlesex Division, No. 88D0551-D1 (June 8, 1988), Ginsberg, J., 6 *Massachusetts Family Law Journal* #3, at 64, (September 1988), (Motion for Protective Order was granted prohibiting release of statements made in conversation with a Probation Officer in a mediation session in the absence of counsel. However, Judge Ginsberg also states he does not believe such expectation of confidentiality exists when the officer tells the parties in advance that oral or written report or recommendation to the court will occur, but that rules of exam and cross-exam applied to guardians *ad litem* would apply in that case to officers and, presumably, to reports, recommendations and the basis for them).

21. Procedures for obtaining reports pursuant to investigation vary from court to court. Usually, reports issue only upon motion and subsequent judicial approval, and may be subject to conditions established by the judge. It is the practice in Probate and Family Court to withhold copies of reports written by family service officers (and GALs) from litigants and attorneys, on the theory that children should not be exposed to the materials contained therein. Litigants or attorneys must petition the court to review or for permission to copy reports; again, the practice varies widely, but allowing copies even to attorneys is the exception rather than the rule.

    Not having copies or access to reports places an unfair burden on *pro se* litigants and on attorneys and agencies without support staff and dictaphones. Those with such resources can work around restrictions more easily. Ways to permit litigants and attorneys to prepare cases and also encourage non-proliferation of reports can be found. Litigants and attorneys can agree and/or be ordered to refrain from releasing the report. If the judge or family service officer believes that a report should be withheld from the parties and/or their attorneys, a court order should be issued to this effect, with notice to all parties.

22. "We hold that, as a matter of statutory interpretation, reports of Probate Court probation officers made to a probate judge pursuant to G. L. c. 276, § 85B, inserted by St. 1969, c. 771, § 3, must be in writing..." Duro v. Duro, 392 Mass. 574, 575 (1984).

23. Barnstable, Berkshire, Bristol, Dukes, Essex, Franklin, Hampden, Hampshire, Middlesex, Nantucket, Norfolk, Suffolk, Plymouth and Worcester. Dukes and Nantucket (the island counties) do not have separate family services offices.

24. Richard E. O'Neil and Anne Cremonini, *Family Service Officer Survey*, 1993, Massachusetts Probate Probation Association.

25. The Office of the Commissioner of Probation has designated, as mandatory, initial training for new probation officers, new chief and assistant chief probations officers and training on standards. All other training by OCP is not mandatory.

26. Significant deviation in practice and in outcome was a matter of concern to the Task Force. Many of the recommendations seek to develop uniformity of practice statewide.

27. G. L. c. 209A, § 3 states that parties in these domestic violence cases may not be required to mediate. The practice in Probate Court varies, but some judges do require parties to mediate or negotiate and many judges require negotiation of collateral issues, such as visitation, support or removal of property. See also, in this report, Considerations for Practice of Family Law in Dispute Intervention, Section IIA, considerations 2, 3, 5.

28. There are different understandings of the word voluntary in the context of mediation. In private settings, where mediation usually is sought by consumers, some mediators assume the parties participate voluntarily while others state to parties that they are free to leave at any time. When the court has ordered the parties to participate, voluntary participation may be construed when no party declines to participate. Private mediation groups may receive referrals from court programs; parties who are ordered to participate in the mediation program may report back to the court about results although the contents of the mediation are considered confidential. Most Probate Courts allow litigants to decline negotiated settlement but not to decline participation in the information-gathering process. Litigants may be insensitive to such complicated distinctions.

29. Responses to the Task Force family service officer survey illustrate this point in a number of places, particularly in response to questions 15, 25 and 28. *Mediation in the Probate and Family Court: A Survey of Family Service Officers*, Task Force on the Role of Mediation in the Probate Court, Committee for Gender Equality, Supreme Judicial Court of Massachusetts, at 5, 13, 16, (1993). See also, Methodology, Appendix B of this report.

30. Of judges responding to a written survey question, "Is FSO role to give recommendations?", 56% responded "yes" and 44% responded "no." *The Probate and Family Court Speaks*, Massachusetts Continuing Legal Education, Inc., Ten Winter Place, Boston, MA, at 45-46, (1993).

    In response to Task Force questions, 82% of family service officers surveyed indicated that they share information with the judge. This may include background on *pro se* litigants that will give a judge a quick grasp of the facts. It may also include a recommendation. *Mediation in the Probate and Family Court: A Survey of Family Service Officers*, Supra note 29, at 19.

    The Task Force survey also asked family service officers about how often judges follow their recommendations when they are called upon to make one. Forty percent said that their recommendations were followed 75 - 100% of the time. Thirty-two percent said that their recommendations were followed 50 - 75% of the time. *Mediation in the Probate and Family Court: A Survey of Family Service Officers,* Supra note 29, at 34.

    In another Task Force survey, judges were asked about cases where mediation resulted in either a partial agreement or no agreement. Fifty-three percent indicated that they always or often require the family service officer to be present at the hearings. Ninety-one percent said that the role of the family service officer at such a hearing was to summarize information relating to unresolved issues and fifty-six percent said that the role included giving recommendations. *Mediation in the Probate and Family Courts: A Summary of Interviews with Probate Judges*, Supra note 1, at 11, 12.

31. Ninety-one percent of family service officers responding to the Task Force survey said they give out written information to litigants and 82% indicated that they routinely make victims in domestic violence cases aware of programs and services which are available to them and their children. *Mediation in the Probate and Family Court: A Survey of Family Service Officers*, Supra note 29, at 7.

32. If agreement is reached, the officer is required to sign the agreement as a witness according to 1994 *Standards* 5:05 and 5:06 and commentary.

33. 1994 *Standard* 5:07 and commentary.

34. An enormous amount of this work would be conducted out of court by attorneys and as discovery or trial preparation if parties were represented and/or had income to fund the services.

35. For example, allegations of sexual abuse of a child may necessitate steps to protect the child and/or to determine facts relative to such allegations. This is an example in which the officer is a "mandated reporter" pursuant to G. L. c. 119, § 51A. Mandated reporters are required to inform the Department of Social Services of such allegations. To promise or propose confidentiality is inappropriate when the officer may be required to report to DSS or to a judge.

36. Andree Gagnon, *Ending Mandatory Divorce Mediation for Battered Women* 15 Harv. Women's L.J., 187 (1992); citing Jessica Pearson and Nancy Thoemes, *Mediation in Custody Disputes,* 4 Behav. Sci. 203, 204, 208, (1986).

37. In comments to the Task Force, Probate Court judges and staff, in both urban and rural areas, estimated the percentage of litigants appearing *pro se* to be from 40-70%.

38. This definition was gleaned from an array of definitions which various mediators and mediation organizations have developed. For reference, a number of them are set forth below:

    (a) "[A] voluntary process using a neutral person to help disputants agree." The mediator has no power to decide the outcome, and any participant may terminate the process anytime. John Fiske, *Mediation*, at 4-1, Vol. I, Haskell Freedman, et al. eds., *Massachusetts Family Law Manual*, 1989.

    (b) "[A] [f]orm[s] of conflict resolution in which a third party helps disputants resolve their conflicts and come to their own decisions." Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation*, 1 Jossey-Bass, (1986).

    (c) "FAMILY MEDIATION offers a voluntary, non-adversarial, dispute resolution option to couples and families who are in the process of restructuring their lives. The parties are helped to reach a self-determined and reasonable agreement by a trained, neutral, third-party: a mediator. The structured process is based on a profound respect for the parties' autonomy and their ability to reach a fair and workable agreement." Massachusetts Council on Family Mediation, Inc. Standards, reprinted in *Massachusetts Family Law Manual*, Vol. I, 4-40 - 4-44.

    (d) "[A] process in which a lawyer helps family members resolve their disputes in an informative and consensual manner." *Divorce and Family Mediation: Standards of Practice for Family Mediators,* American Bar Association, 750 N. Lakeshore Drive, Chicago, Illinois, at 1, (1986).

    (e) Massachusetts General Laws chapter 233, § 23C defines a "mediator" as "a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body." Section 23 provides that communications made in and all documents prepared with respect to mediation are confidential.

Historically, mediation has arisen in particularly homogenous communities. It is embedded in Chinese and Japanese culture and served as an alternative dispute resolution mechanism for Chinese and Jewish immigrants, as well as for the early Quakers. See, Folberg and Taylor, at 1. Mediation has also proven popular with disputants who desire to continue their relationship past the resolution of their dispute. Thus, mediation has been used extensively in labor disputes. See, Folberg and Taylor, at 4. And, more recently, companies have begun to recognize this dynamic of mediation. See, Jim Freund and Marguerite Millhauser, *ADR: A Conversation, The National Law Journal*, S1, (February 27, 1989).

39. "Neutral" means engaged with neither side, not involved in conflict, sometimes indifferent, whereas impartial means favoring neither side, not biased but fair, equitable and just. The American Bar Association Mediation Standard III distinguishes as follows: "Impartiality is not the same as neutrality. While the mediator must be impartial as between the mediation participants, the mediator must be concerned with fairness. The mediator has an obligation to avoid an unreasonable result."

40. In the Task Force's family service officer survey, 82% of the women and 91% of the men said they have a significant impact on the outcome of cases. One family service officer expressed it this way, "If they don't settle, at least I've gotten them thinking about ways to resolve their problem. I hope that they have taken something positive away from the mediation process. If I do resolve it, I have helped make their lives easier." *Mediation in the Probate and Family Court: A Survey of Family Service Officers*, Supra note 29, at 50.

    In the Task Force's judges' survey, a judge felt that mediation empowered litigants and helped them reach their own agreement. Litigants are more likely to be able to fulfill its terms if they reach it themselves. Another judge felt that litigants will learn to talk and solve future problems together when litigation is over. Another judge emphasized how important this communication is when children are involved and the parties will have to continue to work together for a long time to come. *Mediation in the Probate and Family Court: A Survey of Probate Court Judges*, Supra note 1, at 4.

41. 1994 *Standards* 5:00.

42. When a family service officer acts as an investigator pursuant to G. L. c. 276, § 85B by obtaining information and reporting to the court, that officer is subject to different OCP standards as well as statutory and case law.

43. Professor Grillo points out that upon cross-examination, mediators may refuse to disclose the reasons for their recommendations, asserting that the information is privileged. The question of whether a mediator can rightfully claim this privilege or refuse to answer specific questions about recommendations has no answer that adequately protects the parties. "[I]f the mediator is required to testify fully, the mediation is confidential only in the narrowest sense of that word, and the parties' need for full access to their attorneys during the mediation process is apparent. But if the mediator is permitted to limit his testimony, then the parties are deprived of their cross-examination rights just as effectively as if the mediator had never taken the stand." Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545, 1598-1599, (1991).

44. *Draft Report of the California Judicial Advisory Committee on Gender Bias in the Courts*, Administrative Office of the Courts, at 74, (1990).

45. *Massachusetts Gender Bias Study, Family Law*, recommendation #6, Supra note 2, at 27.

46. Parties obviously may choose to continue negotiating, even when the family service officer has reason to believe such negotiation is not appropriate, but the officer should convey his or her reservations to the parties and to the judge. See also *Considerations for Practice of Family Law in Dispute Intervention*, this report.

47. A number of organizations have promulgated ethical standards for family mediators. The American Bar Association Standards Section V "obligates the mediator to suspend or terminate mediation if balanced bargaining cannot be maintained." *Divorce and Family Mediation: Standards of Practice for Family Mediators*, Supra note 38 (d). 1994 *Standards* state: "when necessary and appropriate the Probation Officer may suspend the dispute intervention; and return to court for further guidance." *Standard* 5:04 and commentary.

48. In the Probate and Family Court, judges and sometimes registers can insist on negotiation, even when parties and/or officers choose otherwise. Pressure may be applied to parties who refuse to participate or do not reach agreement. Advocates reported to the Task Force that, upon occasion, refusal to negotiate may result in parties sitting all day, out of rotation on the court list, to make the point that inability to reach agreement will cost parties and attorneys time. Occasionally, parties have been threatened with need to return the next day or with a judicial decision they seek to avoid.

49. Professor Grillo points out that "It may well seem a futile gesture to fail to 'agree' to a proposal that the mediator favors or to disavow the agreement before it is approved by the court -- especially in a jurisdiction where mediators' recommendations are almost always accepted." Grillo, Supra note 43, at 1598. A number of states prohibit a mediator from making any recommendations to the court in a case that he or she has mediated.

50. According to a recently released Supreme Judicial Court report, "non-English speaking participants in the legal system are more likely than English speaking participants to have unsatisfactory results from the court process, including fewer restraining orders in domestic violence cases and higher bails in criminal cases." *Eliminating the Barriers: Equal Justice*, Final Report of the Commission to Study Racial and Ethnic Bias in the Courts, Massachusetts Supreme Judicial Court, at 18, (September 1994).

51. The National Coalition Against Domestic Violence in Washington, D.C. reports that over 50% of all women - of all religious, ethnic, racial, economic, education backgrounds; of varying ages, physical abilities, and lifestyles - will experience physical violence in an intimate relationship, and for 24-30% of those women the battering will be regular and ongoing, *An Interview with a Former Batterer, The Advocate,* at 1, (February 1988).

    An estimated 50% of all women are battered at some time in their lives. Lenore Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds*, New York, NY: Harper & Row Publishers, at 106, (1989).

52. Almost 4 years ago, the Surgeon General of the United States warned that violence was the No. 1 public health risk to adult women in the United States. Unfortunately, 4 years later, it still remains the leading cause of injuries to women ages 15-44 (June 1992), more common than automobile accidents, mugging, and cancer deaths combined. *Violence Against Women, A Majority Staff Report,* Committee on the Judiciary, United States Senate, 102nd Congress, at

3, (October 1992). This is supported in Evan Stark and Anne Flitcraft, *Violence Among Intimates: An Epidemiological Review,* Chapter 13 from *Handbook of Family Violence*, Ed. von Haselt, et. al., New York: Plenum Press, at 301, (1988).

Battering is the single most frequent reason why women seek attention at hospital emergency departments and is the single major cause of injury to women, accounting for 25% of female suicide attempts and 4,000 homicides per year. Howard Holtz and Kathleen Furniss, *The Health Care Provider's Role in Domestic Violence, Trends in Health Care, Law & Ethics,* Vol. 8, No. 2, at 47, (Spring 1993).

53. An important nursing study of pregnant women (1985) and another study of hospital records of pregnant women suggest that approximately 20% to 25% of all pregnant women are battered. Over one half of the battered women in the Danger Assessment study who were pregnant while with the batterer had been beaten while pregnant. Jacquelyn Campbell, *Nursing Assessment for Risk of Homicide with Battered Women*, Community Health Nursing Department, Wayne State University College of Nursing, Michigan, (1986).

    Although family pressures, including number of children, are frequently-cited risk factors for battering, battered women in the medical complex, on average, have no more children than non-battered women, Still, they are pregnant nearly twice as often, significantly more likely to have a miscarriage or abortion, and more likely to be pregnant at the time of their injury, again highlighting the importance of sexual assault. The Texas survey found that 28% of the abused women in their population were beaten while pregnant. And between 20% and 25% of all obstetrical patients are abused women. Evan Stark and Ann Flitcraft, *Violence Among Intimates: An Epidemiological Review,* Supra note 52, at 309, (1988).

54. Various studies have catalogued serious behavioral and emotional consequences of living in a violent home. For example, researchers described a range of children's reactions that included enuresis, stealing, temper tantrums, truancy, violence toward other, insomnia, anxiety, tics, and the presence of fears and phobias. Characteristic problems of pre- and elementary school children include psychosomatic complaints, school phobias, enuresis, and insomnia. Older children show sex-specific reactions. Boys typically engage in aggressive, disruptive behavior, while girls are reported to have difficulty concentrating on schoolwork. In other studies, adolescents, particularly females, were noted to suffer from feelings of worthlessness, depressions, negative attitudes toward marriage, and distrust of intimate relationships. Male adolescents are reported to view the use of force as a legitimate means of solving interpersonal conflict. They are also found to be vulnerable to behaving violently toward their girlfriends and, at times, toward their mothers. Gail S. Goodman and Mindy S. Rosenberg, *The Child Witness to Family Violence: Clinical and Legal Considerations*, Chapter 6 from *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence*, Ed. Daniel J. Sonkin, New York, NY: Springer Publishing Company, at 100, (1987).

    Children who are both victims of parental assault and who witness assault between their parents are ten times more likely to assault a non-family member than are children from non-assaultive families. Murray Straus and Christine Smith, *Family Patterns and Primary Prevention of Family Violence, Trends in Health Care, Law & Ethics*, Vol. 8, No. 2, at 18, (Spring 1993).

55. A Massachusetts woman is murdered by her husband or boyfriend every 22 days according to statistics compiled by the Massachusetts Department of Public Health. Angela Browne,

When Battered Women Kill, New York, NY: The Free Press, at 170, (1987).

As of August, 1992, the surge of domestic violence in Massachusetts had claimed the lives of 30 people: 17 women, three teenagers, five children, and five men, four of those by suicide, Caroline Knapp. *A Plague, of Murders: Open Season on Women*, the *Boston Phoenix*, (August 1992).

According to the Jane Doe Safety Fund which maintains yearly statistics collected from local newspaper reports, 29 women were murdered by their batterers in Massachusetts in 1993.

56. Only 1 out of 7 wife assaults is reported to the police and less than 1 man in 100 (for whom prima facie evidence of wife assault exists) is convicted in court. D.G. Dutton, *The Criminal Justice Response to Wife Assault, Law and Human Behavior* , Vol. II, No. 3, at 189-206, (1987); Donald G. Dutton and Barbara M.S. McGregor, *The Symbiosis of Arrest and Treatment for Wife Assault: The Case for Combined Intervention, Woman Battering: Police Responses,* ed. Michael Steinman, Cincinnati, OH: Anderson, at 141, (1991).

The Bureau of Justice Statistics also found low report rates. Krintina Rose and Janet Goss, *Domestic Violence Statistics*, National Criminal Justice Reference Service, Bureau of Justice Statistics, Washington D.C.: U.S. Department of Justice, at 8, (1989). Other researchers have found similar low rates. Murray Straus and Christine Smith, *Family Patterns and Primary Prevention of Family Violence," Trends in Health Care, Law & Ethics,* Vol. 8, No. 2, at 19, (Spring 1993).

Researchers in Kentucky found that incidents involving nonwhite women are more than twice as likely to be reported to the police as incidents involving white women, 18% to 8%. Mark A. Schulman, *A Survey of Spousal Violence Against Women in Kentucky,* Washington, D.C.: U.S. Department of Justice, at 3, (1979).

57. "No-fault" divorce is often held to be a superior alternative to fault divorces. Statutory revision of time periods, which require less wait for hearing for fault than no-fault divorces, might reduce concern that fault grounds are misused. Incidents of abuse or other conduct may be relevant to other matters, such as visitation or alimony; litigants can plead in the alternative if they desire to preserve a record which may be of use in this or other litigation.

58. G. L. c. 208, § 31 has been amended to rule out joint custody if the judge finds one of a number of factors exists, one of which is that one party has been abusive to another; 209A or other restraining orders will serve as rebuttable evidence of abuse.

59. If the goal is settlement, "mediation allows the stronger, more powerful person to hold firm while the weaker person concedes more and more." As a result, coercion to settle does not affect both sides equally. Under current social conditions, the more powerful person is likely to be male, and therefore empowering the already powerful is inherently gender biased. *Massachusetts Gender Bias Study, Family Law,* Supra note 2, at 24. The pressure to resolve the dispute and serve the court's goal of avoiding litigation may result in inappropriate or unfair agreements in many cases. *California Report,* Supra note 44, at 68-69. See also, Andree Gagnon, *Ending Mandatory Divorce Mediation for Battered Women,* Supra note 36, at 185.

60. The cycle of violence is a pattern of conduct that goes from extremely loving to tense and violent, and then to loving again. The likelihood that the partner will be in an apologetic, loving

stage when he and his partner come to court is as great as the possibility that he will be tense and angry. Both of these extremes present different risks to battered women. In the loving stage, there is a tendency to forgive and agree to vacate orders. Sometimes a battered woman is promised by her batterer that if she agrees to vacate the order her partner's good conduct will be maintained. In the tense or violent stages, battered women are at risk for injury. In this stage, some battered women agree to vacate orders because they are terrified of the consequences of not doing so. Family service officers must attempt to recognize both the covert and overt pressures on women to vacate protective orders, and also need to be sensitive to their own limitations in reading the messages between the parties.

61. *Massachusetts Gender Bias Study, Domestic Violence and Sexual Assault,* recommendation 18, Supra note 2, at 97.

62. A battered woman's first contact with court personnel may be with a family service officer, who will be regarded as having a great deal of power and insight into "the system." An officer who makes predictions about what the judge will say or do can unknowingly jeopardize the battered woman. If the officer predicts that the judge will not give her what she is asking for, she may decide not to go forward with her request, regardless of the detriment to herself or her children. Many of these "predictions" have been taken very seriously by battered women who are desperately looking for "clues" about whether or not they should go forward. If the officer even hints that a restraining order is not necessary or that the woman's fears are unjustified, the message may be seized upon immediately by both parties. This may reinforce the batterer's perception that his partner is hysterical and undeserving of the court's time and that his own conduct was acceptable. To the battered woman, such a message will undermine her confidence in her ability to protect herself or, she will erroneously believe she misinterpreted the risk. She may refrain thereafter from seeking help despite further abuse.

63. Safety plans used by victim/witness advocates, the Department of Social Services, and shelter advocates should be available to family service officers, but officers are strongly advised to refer victims to follow up services available 24 hours a day.

64. G. L. c. 209A, § 3.

65. Gagnon, Supra note 36, at 189.

66. G. L. c. 208, § 31.

67. *Massachusetts Gender Bias Study, Family Law,* Supra note 2, at 25. See also *California Report,* Supra, note 44, at 74.

68. *Massachusetts Gender Bias Study, Family Law,* Supra note 2, at 34-35.

69. Gagnon, Supra note 36, at 193.

70. *California Report,* Supra note 44, at 74.

71. *Ibid.*, See also, Final Report of the Minnesota Supreme Court Task Force for Gender Fairness in the Courts, at 860, (1989).

72. *Massachusetts Gender Bias Study, Family Law,* Supra note 2, at 59-73.

73. *Ibid.*, at 73.

74. Judith Wallerstein and Joan Kelly, *Children and Divorce: A Review,* 24 Soc. Work 468 (1979).

75. Grillo, Supra note 43, at 1595-1596.

76. Joint custody is appropriate when parents are capable of cooperating and implementing shared parenting plans. The primary caretaker should have primary custody unless and until such shared parenting plans are negotiated and reviewed by the judge. Custody of children should not become a bargaining chip in return for more or less support and/or more advantageous property division.

77. Probate Court Supplemental Rule 406, Allowance For Fees, Costs and Expenses, as amended states: An application by a party for an allowance from the other party to prosecute or defend a complaint shall contain a statement that the party intends in good faith to defend or prosecute such complaint, and shall be accompanied by a certificate of the party's attorney that the attorney believes such statement to be true. The judge shall review the financial statements of the parties and other relevant evidence, including affidavits, and shall order an allowance, if appropriate, for counsel fees and necessary expenses. If such allowance is granted, it shall be paid as the court may direct. *Standing Orders of the Probate and Family Court, Probate and Family Court, Massachusetts Rules of Court - State*, St. Paul, Minnesota: West Publishing Company, at 408, (1993).

78. There should be no negotiation of the division of assets until there has been full disclosure and valuation, or acceptance of valuation, of assets. See *Massachusetts Gender Bias Study, Family Law*, recommendation 4.b., Supra note 2, at 27. Discovery requests continue to be taken less than seriously by the courts, although significant change has occurred in many counties since the 1989 Study. Financial statements have been revised, are in common usage, and usually are required prior to any dispute resolution session. Family service officers can play an important role when they suspect less than full disclosure, particularly when one or both parties appears *pro se*. See *Massachusetts Gender Bias Study, Family Law*, Supra note 2, at 22-23.

79. Grillo, Supra note 43, at 1584-1596 and sources cited therein.

80. *Massachusetts Gender Bias Study, Family Law*, Supra note 2, at 24-25.

81. *Ibid.*, at 23.

82. Ginsberg, *Massachusetts Family Law Guidelines*, § 4.02.

83. Comment by judge who reviewed draft report.

84. *Cannons of Ethics and Disciplinary Rules Regulating the Practice of Law, Supreme Judicial Court Rules, Mass. Rules of Court -State*, St. Paul, Minnesota: West Publishing Company, 1993. See DR 1-102 (A)(4) and Dr 7-102 (A)(3) and (6)(6)(B)(1).

85. Ginsberg, *Massachusetts Family Law Guidelines*, Supra note 82, § 4.02.

86. *Massachusetts Gender Bias Study, Family Law*, Supra note 2, at 23-27.

87. In the Task Force's family service officer survey, one family service officer said she "dealt with few economic issues other than child support." In the past, some visiting judges had given family service officers more responsibility, too much responsibility in her view, to do property settlements or complicated tax issues. She told the court that she didn't feel "qualified" to do them and, in fact, "should not handle divorce property settlements/alimony questions."

    Another officer said that he believed that "the more involved economic issues, such as alimony, mortgage and pension benefits, should be litigated and not mediated." In his court, those issues were not sent to the probation office for mediation. *Mediation in the Probate and Family Court: A Survey of Family Service Officers*, Supra note 29, at 6.

88. In the Task Force's family service officer survey, a large majority of the respondents, 82% of the women and 73% of the men, would rather mediate custody issues than property issues. *Mediation in the Probate and Family Court: A Survey of Family Service Officers*, Supra note 29, at 44.

89. *Massachusetts Child Support Guidelines*. Chapter 310 of the Acts of 1986. Codified at G. L. c. 119 under c. 211B, § 15.

90. *Massachusetts Gender Bias Study*, *Family Law*, Supra note 2, at 25.

91. While it is not uncommon practice for attorneys and family service officers to ask women to accept less support in return for desired custody or visitation, generally it is considered inappropriate or unethical to ask a man if he would pay more support in return for his desired arrangement.

92. *Massachusetts Gender Bias Study*, *Family Law*, Supra note 2, at 26.

93. *Massachusetts Child Support Guidelines*, Supra note 89.

APPENDICES

A. GLOSSARY

B. METHODOLOGY

C. FAMILY SERVICE OFFICER DATA

- SOURCES
- DEMOGRAPHICS
- EDUCATIONAL AND WORK BACKGROUND
- TRAINING

D. MODEL FAMILY SERVICE PRACTICE TOOLS

- LITIGANT BROCHURE
- INTAKE/ASSESSMENT FORM
- LITIGANT EVALUATION SURVEY

E. MODEL TRAINING CURRICULUM

A. GLOSSARY

Abuse prevention (209A, restraining or protective) orders direct one person to refrain from abusing another, and also may include vacate, no contact, custody, support and other orders.

Agreement is a written document signed by litigants and intended for submission to the court; when family service officers negotiate an agreement, they are required to sign it as a witness.

Alimony is money paid by one spouse to another; unlike child support, it is taxable to the spouse receiving it.

Arrears usually refer to child support past due or unpaid spousal support.

Chief Administrative Justice of the Trial Court was a judicial position with oversight responsibility for the seven Trial Court departments in the Commonwealth, which has been replaced by the Chief Justice for Administration and Management by court reform legislation approved January 13, 1993.

Chief Justice of the Probate and Family Court Department is the judicial position with oversight responsibility for the Probate and Family Court Department of the Massachusetts Trial Court.

Chief Justice for Administration and Management is the judicial position replacing the Chief Administrative Justice of the Trial Court which, under court reform legislation, has authority to issue rules and standards for family service, concurrent with the Office of the Commissioner of Probation, and which oversees administrative matters in the Trial Court.

Child Support Guidelines were created by United States and Massachusetts law to provide a consistent formula for deducting support for children from an obligor (usually non-custodial parent) and paying to an obligee (usually custodial parent). The formula is based on the non-custodial parent's gross income and the number and age of the minor children, and may be offset by the custodial parent's income and by health insurance cost. Guidelines are discretionary above and below prescribed incomes and in certain situations.

Collateral sources include sources other than the litigants and information unavailable in court on the day of hearing (for example, parents or children of litigants, schools, neighbors, Department of Social Services, criminal records, doctors, teachers, psychotherapists or others providing treatment or services).

Committee for Gender Equality was appointed in 1989 by the Supreme Judicial Court to implement the recommendations of the 1989 Gender Bias Study. The Committee concluded its official tenure in March of 1994.

Contempt, or contempt of court, in Probate Court usually refers to an action brought by one party (or the state) against another party to enforce support or other court order, or to punish the failure or refusal to obey a court order.

Custodial parent is the primary caretaker of minor children.

Custody is the care and control of something, usually a child or children; it implies the responsibilities of maintenance and is usually used concerning division of those responsibilities.

Defendant is the person answering or defending against suit or action.

Department of Revenue (DOR) is a state agency empowered to collect taxes from residents and, in some cases, to collect child support from residents ordered or obligated to pay support.

Division of Assets is a term used to describe the distribution or portioning of property or liabilities, most often in divorce.

Divorce is the legal separation of married parties, dissolving the relationship.

Family service office refers to the office within the Probate and Family Court Department which assigns, supervises and monitors family service officers (also called probation officers) as they intervene in many types of disputes presented to that court.

Family service officers are probation officers who work in Probate and Family Courts under the umbrella of the Office of the Commissioner of Probation. They conduct dispute intervention and investigation when Probate Court judges refer cases for intervention.

Financial Statement is a one-page, double-sided document required of litigants in a Probate Court action, pursuant to Massachusetts Rules of Court, requesting information on income, assets, liabilities and expenses to be signed by the litigant under pains and penalties of perjury.

First Justice of each Division of the Probate and Family Court is the judge in each Probate Court appointed to head or lead that division (or county).

Gross income means total income, before taxes are withdrawn; net income is income actually received.

Investigation is a court-ordered intervention in which a family service officer gathers information from litigants and a variety of collateral sources and reports those findings to the court in writing.

Legal custody under Massachusetts law means responsibility for major life decisions of minor children.

Litigant is a party to a court proceeding, that is, the persons bringing and answering the suit; in Probate and Family Court they may also be called the plaintiff, the defendant, the petitioner, the respondent or parties.

Mandated information gathering stage includes intake, screening and organization and clarification of issues before the court.

Mediation is a form of dispute intervention which usually involves a third party meeting with disputants to assist them to resolve their dispute. As generally understood, mediation is characterized by voluntary participation, confidentiality, and neutrality. The mediator is said not to have a stake in the result.

Motion is a request by a litigant, asking (or "moving") the court to make a specific requested order.

Negotiation as used herein means one or more sessions or meetings for conferring and communicating to attempt to resolve issues prior to court hearing or reach agreement on issues before the court.

Office of the Commissioner of Probation promulgates standards and rules for probation officers (including family service officers) throughout the Commonwealth.

Parenting plans are required by statute when shared or joint custody of children is ordered on a permanent basis.

Party or parties are those directly involved in a court proceeding, also called litigants.

Paternity is a suit to prove or disprove that a person is the father of a child born out of wedlock, necessary to enforce support obligations.

Petitioner is the person bringing an action before the court.

Physical custody in Massachusetts means the person who manages the bulk of day-to-day care of and responsibility for minor children.

Plaintiff is the person who brings the suit or action before the court.

Pleadings refer to the papers filed with the court and include complaints, petitions, answers, counterclaims, motions, affidavits, etc.

Pre-trial as commonly used is a court-scheduled hearing before a judge or in chambers in which the issues are reviewed, pre-trial orders made, and the case is set for trial. It is an opportunity to narrow the issues and resolve the case prior to trial.

Probate and Family Courts of the Commonwealth have jurisdiction over divorce, guardianship, paternity, custody, abuse prevention and related matters and, apart from the Juvenile Court, are most likely to deal with families.

Probation officers are staff supervised by the Office of the Commissioner of Probation. In the Probate and Family Court, they are sometimes referred to as family service officers.

Procedural refers to the methods through which legal activities are conducted, as distinguished from the substance of the law.

Pro se means "for self" and is the term used for people who represent themselves in court, as opposed to having an attorney.

Recommendation or report as used herein means the oral or written statement made by the family service officer to a judge about the case to which the officer has been assigned to collect information, negotiate or investigate.

Register (or Assistant Register) is a clerk of court and usually the "gatekeeper" in the courtroom, the person who receives litigants and their papers and assigns cases to be heard or sent to family service.

Respondent is the person responding to the petition or action before the court.

Restraining orders are orders intending to prevent one party from acting in a certain way (for example, abusing another or spending assets).

Shared or joint custody in Massachusetts refers to cooperative and collaborative parenting arrangements for minor children. Shared or joint legal requires less cooperation and consultation than shared physical custody.

Split custody involves a half-and-half split of physical and legal custodial responsibilities and suggests the ability to maintain close, constant communication as well as shared monetary responsibility.

Substantive refers to the principles of law which are applied to the facts of a case in order to arrive at a decision.

Support refers to money to be paid for maintenance of minor children or a spouse or former spouse.

Visitation refers to arrangements for the non-custodial parent or the grandparents to visit with children, usually following dissolution of a marital or non-marital child-rearing partnership.

B. METHODOLOGY

The Task Force on the Role of Mediation in the Probate Courts wanted to ensure that our recommendations were based on a thorough understanding of the views of the key groups involved in dispute intervention and mediation practice, in and outside of the court. In addition, we wanted to hear the views of "pro" and "con" voices to advocate for and against the use of mediation.

We began by assembling a diverse group of people on our Task Force. The Task Force met for over two years and had numerous discussions at its meetings and sub-committee meetings. The Task Force also reached out to colleagues and users of the dispute intervention process to elicit their views. Additional quantitative and qualitative data was obtained through a series of research techniques, each designed to reach a particular group and described in more detail below.

Finally, a broad group of people who were members of the Task Force, the Review Committee or independent reviewers commented on our work product as it evolved into the final report and recommendations.

Copies of survey and interview questions, and summaries of the results of surveys and interviews, may be obtained from the Administrative Office of the Trial Court.

FAMILY SERVICE OFFICER SURVEY

The Task Force did extensive interviewing of family service officers in the Probate and Family Court Department throughout the Commonwealth. These in-person individual interviews were conducted from June to September of 1992.

In selection of the sample, every effort was made to reflect the gender, ethnic and racial diversity of all family service officers. At the time of the survey, there were 70 family service officers who were not chiefs and assistant chiefs. We interviewed 22 people, 11 women and 11 men. Of those 11 women, six were Caucasian, four were Black and one was Hispanic. Of the 11 men, nine were Caucasian and two were Black.

Nineteen of the interviewees were line staff family service officers and three were in management but handled the duties of line staff family service officers in their court. Management was interviewed when there was only one or no family service officer on staff.

The survey was designed to collect information in four identified categories: domestic violence, power imbalance in the mediation structure, custody and visitation issues, and changes proposed by family service officers. The survey was developed over several months with the comments and suggestions of people familiar with the job of family services officers, experienced in family law matters and experienced in designing surveys.

The survey inquired about general background of the family service officer including education, prior work experience and on-the-job training. The survey collected information on the way mediation is practiced in the individual counties and how cases involving domestic violence are handled. It asked about the current working situation of family service officers with a focus on resources, the work environment and training programs. The survey solicited their suggestions on ways to improve their day-to-day work situation. The final section looked at family service officers' attitudes on a variety of subjects including custody, visitation, child support and mediation.

CHIEF PROBATION OFFICERS SURVEY

The Task Force surveyed the chief probation officers who are the people in charge of each family service office. The survey employed a written questionnaire which was administered either in-person or by phone during the summer and fall of 1992 and winter of 1993. There are twelve family service offices in the state and the chief of eleven offices were surveyed.

The main focus of the survey was to gather information on office wide practices. The survey queried whether there were written guidelines or established practices regarding when to give litigant information on 209A and other subjects, assisting pro se litigants, what to tell a litigant entering dispute intervention and when to terminate. It also inquired about provisions for translators and child care for litigant use, as well as how delinquent payers were notified and how case flow was directed in and out of family service.

JUDGES SURVEY

The Task Force interviewed Probate and Family Court Judges. Group interviews were conducted on May 14, 1993, at the annual conference of the Probate Court. At the time of the interviews, there were 41 Probate and Family Court Judges, 15 females and 26 males, all of whom were invited to be interviewed. A total of 16 judges participated, seven female and nine male, representing 39% of the judges.

At the time that the oral interviews were conducted, the judges were also offered the opportunity to complete a written survey. Many of those being interviewed and several who were not interviewed, 13 in all, chose to complete this survey. This represents 32% of the judges.

BAR AND ADVOCATE FORUMS

The Task Force elicited the views of attorneys and advocates through a series of meetings and individual contacts. Members of the Boston Bar Family Law Section and other family law attorneys, notified through an announcement in the Massachusetts Lawyers Weekly, attended a listening session hosted by the Boston Bar in September, 1993. Fifteen practitioners representing six counties participated in the session. There was a variety of professional experience represented including a divorce mediator, a GAL, a legal services attorney, and chairs and former chairs of related bar associations and bar committees.

A prepared list of questions were distributed to the group and discussion was held on each question. The questions focussed on the need to clarify or further define terms used in dispute intervention; litigant information about the dispute intervention process; issues of unequal bargaining power; special procedures for cases involving domestic violence; child custody, child support, division of property and alimony.

A Task Force representative met with members of the Massachusetts Bar Association Family Law Section in November 1993. Eight Section members, all experienced family law attorneys, requested and received copies of the draft report so that they could participate in the review process. These eight attorneys practice in Suffolk, Barnstable, Bristol, Norfolk, Hampden and Essex counties.

Leaders of the American Academy of Matrimonial Attorneys, Massachusetts Chapter, received copies of the draft report so that they could participate in the review process.

Members of the advocacy community for battered women were involved in the review of draft recommendations and commented on them in meetings and phone interviews during the fall of 1993.

C. FAMILY SERVICE OFFICER DATA

SOURCES

Information on family service officers has been gathered from:

(1) the Office of the Commissioner of Probation (1994);
(2) the Task Force Family Service Survey of twenty-two family service officers (see methodology appendix) (1992);
(3) a Massachusetts Probate Probation Association (MPPA) survey of eighty family service officers from ten counties (Spring 1993).

DEMOGRAPHICS

1. Workforce, Gender and Minority Status

	Total	Male	Female
Chief PO	**12**	**12**	**0**
Minorities	0	0	0
ACPO & First ACPO	**16**	**11**	**5**
Minorities	1	1	0
Line Staff	**88***	**36**	**52**
Minorities	20	3	17

*Of these, fourteen (14) are temporary Probation Officers funded by the Department of Revenue.

2. Years of Service

	1-4	5-9	10-14	15-19	20-24	25+
CPO			1	3	6	2
ACPO			4	11	4	
PO	25	16	20	24	2	1

EDUCATIONAL AND WORK BACKGROUND

The 80 respondents to the Massachusetts Probate Probation Association survey indicated that they hold the following degrees:

Bachelors	100%
Credits Beyond a Bachelor's	21%
Masters Degree	33%
Credits Beyond a Masters Degree	13%
Doctorate Degree	3%

Respondents to the Task Force survey indicated that fields studied were relevant to probation work, including human services, criminal justice, psychology, education, social work and sociology. Work histories prior to working in family services are also relevant, with largest representation in social service settings (eleven) and in educational institutions (six).

TRAINING

Respondents to the MPPA survey reported the total hours of training they had received from OCP, local court-sponsored programs, and outside sources before entry and while in the probation service. On average, the eighty respondents listed taking the following hours of training:

Basic Mediation Training (Theory & Practice)	34.2 hours
Substantive Training	
Alcohol	18.6
Children's Issues	29.3
Domestic Violence	17.2
Drug and Substance Abuse	14.4
Financial Issues	15.4
Legal Issues	17.3
Interviewing Skills	15.7
Psychological Skills	29.9
Sexual Abuse	18.5

DISPUTE INTERVENTION AND THE FAMILY SERVICE OFFICE

When you come to the Probate and Family Court for a hearing in your case, you may be referred to the Family Service Office for dispute intervention. Many types of cases are referred to Family Service for dispute intervention including divorce, paternity, custody, visitation, and support cases.

Dispute intervention involves meeting with a Family Service Officer to assess issues and, if possible, come to an agreement on one or more of the issues before the court. Dispute intervention is different from a courtroom proceeding because the formal rules of evidence and rules of court do not apply. This may allow you to participate more fully in your case. The Family Service Officer, who is an officer of the court and under the direction of a judge, will serve as an impartial party in your negotiation.

FUNCTIONS OF DISPUTE INTERVENTION

- to gather facts about each case and in some cases to report what is found to the judge.
- to make recommendations to the judge, if asked, based upon the facts which have been gathered.
- to evaluate whether the parties can reach full or partial agreements before hearing.
- if possible, to assist parties to negotiate and write up agreements based on their choices.

WHAT TO EXPECT IN DISPUTE INTERVENTION

The following are principles that should apply to all dispute intervention sessions. If, at any time, you believe they are not being followed in your case, please raise your concerns with the Family Service Officer or with some other court official.

Dispute intervention sessions are **private.** Your case will not be discussed in public or in front of other people who are not involved with your case.

Working towards compromise or agreed upon settlement in the dispute intervention process is **voluntary**; you will not be forced to make an agreement. If no agreement or only partial agreement is reached in dispute intervention, your case will be brought before the judge who will make an order.

Family Service Officers do not give legal advice, make referral to specific attorneys, or predict judges' decisions. They can tell you some of what is likely to be ordered at hearing, but no one can actually predict what a judge may decide.

It is **not necessary to have a lawyer** present for dispute intervention but parties may ask for their attorneys to be present. The Family Service Officer may ask attorneys to limit their participation.

The Family Service Officer will listen, respectfully and without bias, to what you and the other party have to say. You will be given **ample time** to tell your story.

Agreements you make will be reduced to a written document which will be signed by the parties, their attorneys if they are represented and the Family Service Officer. A judge will review the agreement, usually in your presence, and generally will adopt it as a court order which is then legally binding. If you do not understand the written agreement, do not think it is workable, or you do not agree, you do not have to sign it.

Either party **may withdraw from the negotiation phase of dispute intervention at any time**; if one of you does withdraw, it will end at that point. You have the alternative of seeing a judge, and telling your story to the judge.

The Family Service Office provides a **variety of other services** to the court. The most common one, in addition to dispute intervention, is investigation which involves meeting with the Family Services Officer who will contact others to obtain more information about your case. In an investigation, agreement may result, but it is not the purpose. Investigation is ordered by a judge to assist the court, it is not voluntary and you cannot refuse to participate.

You should be safe at all times during this process. You are neither required to participate in a meeting with someone who has abused you nor stay alone in a meeting room with someone who has abused you. If you feel unsafe or uncomfortable, tell the Family Service Officer.

In cases where you are seeking an abuse protection order, where you have an abuse protection order, or where there has been domestic violence, you are not required to meet together with a person against whom you have the order or are seeking the order, nor are you required to engage in the negotiation phase of the dispute intervention process. In addition, the Family Service Officer can assist you in keeping your address unknown to anyone who has abused you.

Disclosures made to a Family Service Officer are not confidential. Anything you say may be reported to a judge or other legal authority.

Dispute Intervention In The Family Service Office

Commonwealth of Massachusetts

Probate and Family Court Department

D. MODEL FAMILY SERVICE PRACTICE TOOL: INTAKE/ASSESSMENT FORM

Case Name: _____ Docket #:_____ County: _____
Type of Case: _____ Date: _____
Reason for Hearing: _____

An assessment of this case, including review of the intake form, financial statement and other records and individual interviews with the parties, has been completed. The following are the results.

____ Based on assessment, this case is appropriate for negotiation but the parties have declined for the following reasons:

_____
_____

____ Based on assessment, this case is appropriate for negotiation, the parties have been informed about the process of negotiation and they have decided to proceed.

____ Based on assessment, this case is not appropriate for negotiation for the following reasons:

_____
_____

____ The parties have decided to proceed.

____ The parties have decided not to proceed.

IN CASES INVOLVING DOMESTIC VIOLENCE

Based on the assessment, I have reasons to believe that domestic violence is involved in this case. The following options are being pursued.

____ Additional interview questions are being used to further assess the level of the violence. This includes the additional questions from the list attached.

____ Information gained in the assessment will be reported to the judge or other authorities.

____ A plan is needed to ensure the safety of one or more of the parties either in the courthouse and/or after leaving the courthouse.

_____ _____
Family Service Officer Date

MODEL INTAKE/ASSESSMENT FORM, cont.

In all cases, ask questions 1 - 3.

1. Dispute intervention often occurs with both parties together in the same room. Do you have any concerns about negotiating in the same room with the other party?

2. Do you have any reasons to fear the other party?

3. Has the other party ever hit or threatened to hurt you in any way?

Ask questions 4 - 7 whenever more information is needed.

4. Has your spouse ever hit you or used any other type of physical force towards you?

5. Have you ever called the police, requested a protection from abuse order, or sought help for yourself as a result of abuse by the other party?

6. Are you currently afraid of physical harm from the other party?

7. Dispute intervention is an impartial process in which parties work together with the family service officer to negotiate details of their case. Do you believe you would be able to communicate with the other party on an equal basis in negotiation sessions?

In all cases involving children, ask the following question.

8. Is there any reason to fear any harm to your child/children from the other party?

If more information is needed, ask the following questions.

9. Has the other party ever threatened to remove or deny you access to your children?

10. Were any of your children ever struck by you, the other parent or by any partner, companion, family member or friend of yours or the other parent? If yes, was it reported to anyone?

11. Have any of your children ever witnessed violence towards another family or household member (including being anywhere in the home or vicinity when an incident is occurring)?

12. Do you have any concerns about the child or children's well-being with you or the other parent?

13. Has the Department of Social Services ever been involved with your family?

D. MODEL FAMILY SERVICE PRACTICE TOOL: LITIGANT EVALUATION SURVEY

COURT:_____ COUNTY:_____ DATE:_____

1) What legal action and issues brought you to court today? (circle all that apply)

a) divorce	g) contempt	m) restraining order
b) paternity	h) separate suppt.	n) vacate order
c) modification	i) custody	o) medical insurance
d) 209A petition	j) visitation	p) division of property
e) guardianship	k) child support	q) grandparent's visitation
f) pre-trial hearing	l) spousal support	r) other_____

2) Have you ever been in the Probate Court before? Yes No
On this case or another case? _____

3) Were you represented by a lawyer today? Yes No

4) Did the other party have a lawyer today? Yes No

5) If the other side was represented and you were not, was the attorney present during negotiation? Yes No

If yes, did you feel the other side was at an advantage because of that? Yes No
Explain:_____

_____

_____

6) Did you expect to be referred to the family service office for dispute intervention? Yes No

7) Was the purpose of dispute intervention explained to you? Yes No

8) Were you given a choice of whether or not you wanted to participate in the negotiation phase of dispute intervention? Yes No

9) Did the family service officer discuss the issue of confidentiality with you? Yes No

10) Were you able to openly discuss your issues with the family service officer during dispute intervention? Yes No

11) Were you given adequate time to discuss the issues you brought before the court today? Yes No

12) Do you think the family service officer understood you and the issues of your case? Explain:_____ Yes No

_____

_____

13) Were you and the other party able to reach any agreement on the issues before the court? If yes: Yes No
a) Did you appear before a judge? Yes No
b) Were you given copies of the agreement? Yes No

c) Was it explained to you that a judge would review the agreement and if accepted, it would become legally binding? Yes No

14) Did the terms of the agreement address your concerns & needs? Yes No

15) Did you think the family service officer remained impartial during negotiation? Yes No
If no, explain:_____

_____

_____

16) Did you feel pressured by anyone to come to an agreement? Yes No
If so, explain:_____

_____

_____

17) If you were unable to reach any agreement, did the family service officer give a recommendation to you and/or your attorney(s) on the contested issue(s) before returning to court? Yes No

18) Did the judge ask the family service officer for a report or recommendation? Yes No

19) If a recommendation was provided to the judge, was it fair? Yes No
Explain: _____

_____

_____

20) Would you go thru the process of dispute intervention again if given the opportunity? Explain:_____ Yes No

_____

_____

21) Did you feel respected by the family service officer? Yes No

22) Was language interpretation available to you? Yes No

23) Were the facilities where the negotiation was conducted adequate in terms of the room, seating, space, privacy? Explain:_____ Yes No

_____

_____

24) Was your treatment by court personnel, other than the family service officer, professional and respectful? Yes No
Explain:_____

_____

25) Additional Comments. Please include any ways you were helped by negotiation or other aspects of dispute intervention and any suggestions for improvement. (use this and other side)

E. MODEL TRAINING CURRICULUM

GENDER ISSUES IN DISPUTE INTERVENTION IN THE PROBATE COURT

SESSION I - OVERVIEW OF GENDER ISSUES IN DISPUTE INTERVENTION

WHO SHOULD ATTEND? This session addresses the most essential components of the curriculum. It should be attended by judges, Chiefs and Assistant Chiefs and family service officers. Judges are responsible for directing the use of dispute intervention and family service officers carry out the practice. Both groups need to attend Session I and will find it particularly useful to participate together in such a session.

- Gender conditioning in society: why we think the way we do, stereotyping and misconceptions, gender and other diversity issues.
- Gender bias in dispute intervention and how it can disadvantage one or both parties.
- What does the literature and research say about gender bias in mediation both in and outside the courts?
- What is the effect of the family service officer's gender? Are there gender style differences in mediation?

SESSION II - POWER AND POWER IMBALANCE

WHO SHOULD ATTEND? Power imbalance is a central issue in understanding gender bias in dispute intervention. All Chiefs and Assistant Chiefs should attend this session. All family service officers should have the option to attend. There should be review sessions in each office for those who do not attend.

- What is power? How do you assess it?
- Recognizing who has the power, including the family service officer, and recognizing what factors cause power imbalance.
- Screening cases and addressing power imbalances.
- How the presence or absence of an attorney affects power imbalance.

SESSION III - FINANCIAL ISSUES

WHO SHOULD ATTEND? Family service officers have increasing responsibility in this area. All Chiefs and Assistant Chiefs should attend. All family service officers should have the option to attend. There should be review sessions in each office for those who do not attend.

- Potential for bias in financial decisions.
- What does the literature and research say about the effect of divorce and family dissolution on people's financial status.
- Division of marital assets including mandatory factors, house, pension.
- Alimony, child support and health insurance.

SESSION IV - DOMESTIC VIOLENCE

WHO SHOULD ATTEND? Domestic violence training will be delivered to employees throughout the court system beginning in spring 1994. That training will establish a foundation for Session IV which will address issues particular to the dispute intervention context. All Chiefs and AssistantChiefs should attend session IV. All family service officers should have the option to attend. There should be review sessions in each office for those who do not attend.

Guidelines for dispute intervention when a case may involve domestic violence.
Screening cases.
Can we empower a victim and intervene with a perpetrator?
Is visitation appropriate and under what circumstances?
When, why and how to terminate a mediation session when domestic violence is involved?
Series wrap-up and evaluation.